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Supreme Court, U.S.
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In the
Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and AK STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit decided an important issue of federal law in a way contrary to the decisions of this Court concerning salvage, when it affirmed a district court decision offsetting a conversion judgment with an alleged salvage claim never preserved in either of the two exclusive ways approved by this Court and traditional salvage law?

LISTING OF ALL PARTIES TO THIS PROCEEDING

1. Steven Henry Arthur Adams, for Himself and as Representative of Certain Underwriters at Lloyd's, Petitioner

2. Indemnity Marine Assurance Company, Ltd., Petitioner

3. The Yorkshire Insurance Company Limited, Petitioner

4. Commercial Union Assurance Company PLC, Petitioner

5. Phoenix Assurance PLC, Petitioner

6. Cornhill Insurance PLC, Petitioner

7. Norwich Union Fire Insurance Society, Ltd., Petitioner

8. Northern Assurance Company, Ltd., Petitioner

9. Skandia UK Insurance PLC, Petitioner

10. Ocean Marine Insurance Company, Ltd., Petitioner

11. Folk Sam International Insurance Company (U.K.) Ltd., Petitioner

12. Scottish Lion Insurance Company, Ltd., Petitioner

13. Wurttembergische Feuerversicherung AG, Petitioner

14. Sphere Drake Insurance PLC, Petitioner

15. Dai-Tokyo Insurance Company (U.K.) Ltd., Petitioner

16. UMS Generali Marine S.p.A., formerly known as Union Mediterranea Di Sicurta

17. American Eagle Marine, Inc., Respondent

18. A.K. Steel Corporation, formerly known as Armco Steel Company, L.P., Respondent

19. Britamco Underwriters, Inc.

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Christopher O. Davis
Counsel for UMS Generali Marine S.P.A.

RULE 29.6 STATEMENT

The Petitioner, Steven Henry Arthur Adams, is a competent major and a subject of the United Kingdom of Great Britain and Northern Ireland. The unnamed underwriters are likewise subjects of the United Kingdom of Great Britain and Northern Ireland. The corporate petitioners are publicly traded corporations whose shares may be purchased on various exchanges worldwide.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

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Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Steven Henry Arthur Adams, etc., et al respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment of the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana appears not to be reported, but is reproduced herein as Appendix A.

The Fifth Circuit Court of Appeals entered Judgment on September 19, 2000. Appendix B-1. The opinion of the United States Court of Appeals for the Fifth Circuit is published as Adams, et al v. Unione Mediterranea de Sicurta, et al, 220 F.3d 659 (5th Cir. 2000) and is reproduced herein as Appendix B.

Plaintiff's Petition for Rehearing was denied September 14, 2000 and was not officially reported. It is reproduced herein as Exhibit C.

JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Art. III § 2 and 28 U.S.C. § 1333.

STATEMENT OF THE CASE

The question of law posed by this writ application is whether there are any circumstances in which a maritime salvor may sell salvaged goods without the permission of the

owner or by order of a federal court and retain his right to an award in salvage. In other words, does the admiralty and maritime law ever countenance "finders-keepers/losers-weepers" in a matter of marine salvage, absent an abandonment sanctioned by Court order? Plaintiffs submit that for nearly two hundred years the decisions of this Court and lower admiralty courts have unanimously answered this question: No. The Fifth Circuit holding, which the petitioners seek this court to review and overturn, creates a rule of law contrary to this overwhelming weight of precedent. In a single sentence, the Fifth Circuit's decision sweeps away two centuries of settled federal law and in its place establishes precedent that approves of a system of "finders-keepers/losers weepers;" a system abhorrent to the spirit of the law.

Petitioners will show that quite to the contrary of the rationale of the Fifth Circuit's ruling, the law as crafted by this Court does not permit a salvor under any circumstances to retrieve imperiled property, neglect or intentionally fail to advise the owner of the operation, sell the property without the consent of the owner or the court and remain entitled to salvage rights. The following review of the decisions of this Court and other admiralty courts unequivocally demonstrates that the law established by this Court does not sanction such behavior and responds to it by depriving the salvage claimant of any rights he may have otherwise been entitled.

The Fifth Circuit's decision strikes at the very heart of the purpose of the law of salvage in two ways. First, it effectively removes the federal courts from their position as the ultimate arbiters of salvage law and permits salvors to unilaterally decide ownership, sale and compensation in salvage salvage matters. Second, it upsets the balance of interests between the public, the salvor and the owners that is the

fundamental purpose of the salvage law as shaped by this Court since the earliest years of its existence. Where the law before the Fifth Circuit's decision maintained an equilibrium among disparate interests, the Fifth Circuit's new rule tilts the system decidedly in favor of the salvor.

Petitioners will further show that the decision has repercussions beyond the limited circumstances of this case. The decision affects two important aspects of interstate and foreign commerce: the shipping trade itself and the insurance business that enables it to operate. This decision will affect the cost of doing business in the first instance by increasing the cost of insurance necessary to allow ocean and river voyages. Secondly, since the decision makes imperiled property fair game to sea-going scavengers, owners and insurers will be required to take expensive measures to insure the security of their property after sinking.

Petitioners, accordingly, submit that the Fifth Circuit has decided an important question of federal law in a manner that not only conflicts with decisions of this Court, but has created a precedent that is inimical to the law established by this Court. A decision that so drastically alters the law affecting a significant branch of interstate and foreign commerce is reserved to this Court.

STATEMENT OF THE FACTS

On October 16, 1993, a million dollars of steel slabs being shipped via a flotilla of barges sunk in the Mississippi River near Vicksburg. While the parties sought to settle the ownership and insurance consequences of the casualty, the steel remained in the river for the next eighteen months; its prime condition unaffected by the fresh water environment of the river. At the end of January 1995, as the parties were concluding the insurance and ownership issues, the respondent American Eagle, who had at one time been under contract to

salvage the cargo, undertook voluntary salvage of the steel. The respondents A. K. Steel and American Eagle were the only parties who knew of the undertaking.

Previous to the beginning of the salvage operation, petitioners/underwriters, who were insurers of the cargo, filed an action for declaratory relief seeking to determine the proper party to whom the insurance proceeds should be paid and which of two insurance policies covering the cargo loss should respond to the casualty. A. K. Steel as the original consignee of the steel was a party to the declaratory relief action. It remained a party until January of 1995 when it foreswore any ownership interest in the steel and was voluntarily dismissed. On February 1, 1995, petitioners/underwriters paid $986,352.40 to Duferco, who was determined to be the owner of the steel. This payment transferred ownership of the steel to petitioners/underwriters.

Eighteen days after the settlement with Duferco, unbeknownst to petitioners, American Eagle raised the first bars of steel from the sunken barges. The operation would last almost three months, most of which was spent in down time because of unfavorable river conditions, cost in excess of $500,000, and resulting in the loss of a tug. However, American Eagle would recover all except a few bars of the steel and sell all the recovered cargo to A. K. Steel, save one bar which remained in the possession of American Eagle, until its bankruptcy.

A. K. Steel began negotiating with American Eagle for the purchase of the steel while it was still a party to the action for declaratory relief. Correspondence between the respondents shows that A. K. Steel knew that it was dealing with the identical steel originally consigned to it by Duferco. There is no doubt that A. K. Steel knew it was dealing with the steel at issue in the declaratory relief action. American Eagle was no neophyte salvor having performed numerous voluntary and

contract salvage actions. It knew that there were insurers and owners involved with the cargo. In fact, one of the insurers specifically advised American Eagle that they were interested underwriters represented by counsel. At no time did American Eagle or A. K. Steel notify the petitioners of the salvage operation nor were the petitioners aware of the operation.

When the last of the cargo was being lifted from the river, petitioners were notified by Canal Barge, the owner of the sunken barge that American Eagle was salvaging the steel. Petitioners immediately demanded that American Eagle and A. K. Steel cease the operations and desist from selling the steel. The demand was ignored and the petitioners initiated this current action by amending their complaint for declaratory relief to seek a judgment in the amount of the value of the steel on the grounds of conversion.

At no time did American Eagle attempt to return the property to the petitioners, attempt to negotiate with underwriters or initiate an action for an award of salvage. A. K. Steel neither offered to settle the claim nor return the steel. It was not until more than two years later, during the pendency of the conversion claim that counsel for American Eagle and A. K. Steel each amended their answers and asserted a right to an award for salvage. By this time, however, all parties agree that whatever claim existed had lapsed and would have been dismissed had it been brought in its own right. However, the lower courts permitted the respondents to assert this alleged salvage claim as a defense on the principle that what cannot be used as a sword may be nevertheless used as a shield. Petitioners have not, as was assumed by both lower courts, admitted that respondents possessed a valid, but stale claim. On the contrary, petitioners have never admitted the validity of the salvage claim but have defended since the outset of the

case on the grounds that a claim for salvage never existed.

Petitioners have argued from the outset that the respondents had no right to claim salvage because they failed to preserve or perfect a claim for salvage. Because the respondents did not return the property or file an action for a salvage award, a claim never existed and was, therefore, never viable for any purpose. The only way then by which the respondents' potential salvage claims could be valid for any purpose would be if the law were changed and a third, yet to be articulated way of preserving a salvage claim were created. This is what the Fifth Circuit did. It changed the law by providing for a third unidentified, unarticulated way in which to preserve a salvage claim.

The petitioners maintain that this decision should be reviewed by this Court in the exercise of its supervisory authority over admiralty and maritime law, because it alters a significant area of federal law, is inconsistent with the long-standing precedent of this Court, and will negatively impact a significant area of interstate and foreign commerce. Petitioners maintain that the law that this decision upsets has been settled and untouched for nearly two hundred years and it is relied upon by the shipping, insurance and salvage industries to govern their business operations. All of these factors militate that the Supreme Court should exercise its authority over admiralty and maritime law and review this decision.

ACTIONS OF THE DISTRICT AND APPELLATE COURTS

The District Court found that American Eagle and A. K. Steel had converted the steel, albeit, negligently. It found that while the non-existent claim for salvage had expired, the

salvage claim could nevertheless be used as a defense to the conversion claim. Accordingly, the Court offset the conversion judgment it entered in favor of the petitioners by the value of the potential salvage claim of American Eagle. The result of this finding was that petitioners were awarded less than one-fifth the value of a million dollars of steel, which award they were incongruously ordered to divide with an insurer that had denied it any had liability for and consequentially refused to pay its share of the loss.

The Fifth Circuit affirmed the salvage findings of the district court. It rejected the petitioners argument that the respondents had not preserved or perfected a claim for salvage as required by the admiralty and maritime law. Although the Fifth Circuit admitted that neither respondent had complied with the traditional requirements necessary to preserve a claim for salvage, it found that "[A]lthough the two defendants did not preserve a salvage claim in the traditional manner, they did properly assert such a right as an affirmative defense and recoupment to the Plaintiffs claims." Fifth Circuit Opinion Appendix "B" page B-30. (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. Whether the Fifth Circuit decided an important issue of federal law in a way contrary to the decisions of this Court concerning salvage, when it affirmed a district court decision offsetting a conversion judgment with an alleged salvage claim never preserved in either of the two exclusive ways approved by this Court and traditional salvage law?

SALVAGE JURISPRUDENCE

The ancient and consistent jurisprudence governing salvage is contrary to the law enunciated by the Fifth Circuit in this case. This Court established the policy that would be the foundation of American salvage law very early in the history of the federal jurisprudence on salvage. In the 1804 case of *Mason v. The Blaireau*, 6 U. S. 240 (1804), this Court was asked, inter alia, to decide whether the captain of a rescuing vessel was entitled to an award in salvage in a case where he embezzled a portion of the cargo. Chief Justice Marshall stated the policy considerations that would form the spirit of the salvage law for the next one hundred ninety-six years as follows:

> If a wise and humane policy be among the essential principles which induce a continuance in the allowance of that liberal compensation which is made for saving a vessel at sea, we must at once perceive the ground on which it is refused to the person whose conduct ought to be punished instead of being rewarded. The same policy which is so very influential, in producing the very liberal allowances made by way of salvage, requires that those allowances should be withheld from persons who avail themselves of the opportunity, furnished them by the possession of the property of another, to embezzle that property. While the general interest of society requires that the most powerful inducements should be held forth to men, to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct, with regard to the objects thus preserved. This would cer-

> tainly justify the reduction of the claim, to a bare compensation on the principles of a real quantum merit, and the losses in the cargo, which may be imputed to the captain, would balance that account, if, as it is contended by his counsel, the court could not, on principles generally received, consider the act of embezzlement as a total forfeiture of all right to salvage.

But the case of a mariner, who forfeits his right to wages by embezzling any part of the cargo, is precisely in point. That case stands on the same principles with this, and is full authority for this, since it cannot be denied, that the right to salvage is forfeited by the same act that would forfeit the right to wages.

Early then in its history, this Court found that the law of salvage was a three-sided instrument imposing burdens on the salvors and owners alike for the good of the public interest. The liberality of awards for sea-going salvage carried with it a concomitant obligation on the part of the salvor to perform salvage in a fair and upright manner. To enforce this policy, this Court was not reluctant to require the forfeiture of the right to the award if embezzlement were proven.

Justice Story in *Rowe v. The Brig*, 20 F. Cas. 1281 (Cir. Ct. Mass. 1818), a case in which he was riding Circuit, stated the policy on which salvage law is founded as follows:

> In cases of salvage, the measure of the reward has never been adjusted by a mere estimate of the labor and services performed by the salvors. These, to be sure, are very important ingredients; and are greatly enhanced in value, when they have been accompanied by personal peril and gallantry, by prompt and hardy enterprise, and by severe and long-continued exposure

> to the inclemencies of wind and waves. But an enlarged policy, looking to the safety and interest of the commercial world, decrees a liberal recompense, with a view to stimulate ambition, by holding out what may be deemed an honorable reward. *Nor should it be forgotten, that the same policy has a strong tendency to discourage petty plunderage and concealment of the property saved; and to induce salvors to bring it in good faith before judicial tribunals, and rely upon their justice for ample remuneration.* (Emphasis supplied.)

Again in the Bello Corrunes, 19 U. S. 152 (U. S. 1821) this Court in rejecting the salvage claim of the crew of a privateer stated the Rule of salvage as follows:

> As to the claim of the salvors, it may be remarked, that maritime Courts always approach them with great benignity and favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view *every indication of a disposition to take advantage of the unfortunate.* Spoilation, and even gross neglect, may forfeit all the pretensions of salvors to compensation. In the case before us, it is not too much to pronounce the claim of those of the crew of Puyerredon (the privateer) who libel for salvage, to be not only groundless but impudent; for, besides spoilation, smuggling, the grossest irregularities, it is perfectly clear from the pilot's evidence, that they ran the vessel on the shore purposely. *So, that whatever may have been the reality of their benevolent designs toward the Spanish owners originally, their subsequent conduct not only cause a doubt over their candor, but divests them of all pretensions to compensation.* (Emphasis supplied.)

In the matter of *The Boston*, 3 F. Cas. 932 (Circuit Court of Mass. 1833), Justice Story, again riding circuit, dealt with a case that in many respects is similar to this case in the way in which the salvors took advantage of the vessels's misfortune. The Boston was in dire straits near Cape Cod when it was taken into tow by the Magnolia. After performing what was admittedly admirable service in rescuing the foundering Boston, members of the crew of the Magnolia sacked the ship and looted its cargo and tackle and gear. Justice Story, whom the treatises credit with the creation of a stable and coherent admiralty law out of the early chaos of the precedent, set out clearly and distinctly the salvage law as it has been interpreted for the next one hundred sixty-seven years:

> The maritime law demands of the parties engaged in maritime concerns scrupulous good faith and uprightness of conduct. And it prescribed this most emphatically of salvors, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence. *See Mason v. The Blaireau*, 2 Cranch [6 U. S.] 240; (other citations omitted). But in cases of embezzlement the law would fall short of its usual foresight, if it did not inflict a more admonitory punishment. Accordingly, it will be found, I believe, in maritime jurisprudence of the whole world that, that embezzlement by salvors, directly, or by connivance, is punished by forfeiture of all claim to salvage. In morals, in general justice, in sound policy, it should be so; for what can be more inhuman, or more thoroughly without apology, than to plunder the distressed, or to add the losses of fraud to the unavoidable calamities of shipwreck? In American and English law the doctrine is fully recognized; and it is

applied with unfaltering firmness, whenever the fact is clearly established. (Citations omitted).

Next, Justice Story sets out in precise terms what was necessary to make out a valid claim for a salvage award, whether in rem or in personam.

> A court of admiralty is to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in any other court of equity, that the party, who asks aid, must come with clean hands. In cases of salvage, the party founds himself upon a meritorious services, and upon the implied understanding, *that he brings before the court, for its final award, all the property saved with entire good faith; and he asks a compensation for the restitution of it uninjured, and unembezzled by him. However meritorious the act of saving may have been, if the property is subsequent lost, and never reaches the owner, no compensation can be claimed or decreed.* (Citations and text omitted).

> The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restitution, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors. *What claim could be more extraordinary than an annunciation by a salvor in a court of justice, that he has saved the property, and had afterwards perpetrated a gross fraud or theft upon the owner, for the purposes of withdrawing the property from him; then to ask, in the same breath, for compensation for his labor, notwithstanding his iniquity? Such a claim, it seems to me, would be at war with the first principles of justice, and certainly with those of all maritime jurisprudence. I hold, that*

> *every act of misconduct of the salvor, as to the property, fraudulently or wantonly done to the injury of owners, at any time before salvage is to be decreed, is to be treated in the same way, as if it occurred, while the property was in their exclusive possession.* (All emphasis supplied.)

This has seemingly been the law of the land since the inception of the reported admiralty law. See also *The Island City*, 66 U. S. (1Black) 121, 17 L. Ed. 70 (1861). And it seemingly was the law in the Fifth Circuit. See *Jackson Marine v The Blue Fox*, 845 F. 2d 1307 (5th Cir. 1989). The argument that either of these respondents should be afforded the benefit of a salvage is patently at war with the first principles of maritime jurisprudence.

As a result of the policy established by this Court in the foregoing cases, admiralty courts, to enforce the first principles of maritime jurisprudence, have required that salvors either return the property to the owner, which would permit of an action *in personam*, or by filing an action against the res, the so-called action *in rem*. In either event the salvor has sought the authority of the court for the fixing of his reward and has complied with the policy that he should not dispose of the property without the approbation of the court. According to Norris in Benedict on Admiralty,

> The cases are clear that a total forfeiture of the salvor's award, will be declared by the court when the salved property has been looted, stolen, concealed, unlawfully appropriated, embezzled, destroyed, etc., and the proof of such acts has been established beyond a reasonable doubt. Norris, Benedict on Admiralty @ sec. 104 page 8-16.

The case law makes equally clear that it is the duty of the salvor to bring the property to a safe port where it can be in a position to be claimed by owner or brought under the control of the admiralty court. Norris, Benedict of Admiralty, *supra* @ § 19 page 8-40. Later on his treatise, Norris revisits this issue. In the following excerpt, he clearly distills the essence of what this Court and the lower admiralty courts have held the law to be over the last two hundred years.

> It can be stated again that the owner of property in distress or lost on navigable waters, is not divested of his ownership. This is true whether the property is derelict and floating on the water, a stranded wreck breaking up on a beach or where it is reposing fathoms deep. The salvor who rescues such property does so for the benefit of the owner, the principle that underlies the salvage law of all maritime nations. The salvor does not become the owner of the salved property by virtue of his services. He merely has a maritime lien granted by the general maritime law to ensure that his reward for saving the property will be satisfied out of the property saved.
>
> ***It becomes the duty and the obligation of the salvor to bring the aided property to a safe place for eventual return to the owner or, at least, to where the owner may be in a position to reclaim his property. Unless there has been some adjustment between the salvor and the owner, the property must come under the custody of the admiralty court by virtue of the filing of a complaint against the property and the arrest of the salved property by the United States Marshal. The salvor does not simply have the right to keep the salved property and should he do so, would become subject to a suit for conversion.*** (Emphasis supplied).

Uniformity of International Law

Likewise, the law established by this Court is apparently the law recognized and enforced by the world's maritime nations, including The United Kingdom, and is certainly the law as recognized by The Salvage Convention of 1910 (The Salvage Act, August 1, 1912, c. 268, 46 U.S.C. 726, *et. seq.*) and the International Convention on Salvage, 1989. The law formulated by this Court is also in general outline and purpose the same as our major trading partners, The United Kingdom, Japan, Korea and the various members of the European Union. See the laws of The United Kingdom. The Merchant Shipping (Salvage) Act, 1916 (6 and 7 Geor. 5, c. 5, Sch. 21). The foregoing nations along with the United States are all signatories of the International Convention on Salvage, 1989. Moreover, the law as established by this Court is the foundation of treaties between the United States, Canada and Mexico. (U.S. Statutes at Large Vol. 35, page 2035 (Canada) and U.S. Statutes at Large Vol. 49, page 3359 (Mexico)). Accordingly, the international salvage law is in conformity with the law recited in the foregoing.

According to the foregoing jurisprudence, the viability of a salvage claim is wholly dependent on the salvor adhering to the requirements that the property either be returned to the owner or brought to the court for disposition. The jurisprudence admits of no exceptions nor does it provide a third way.

The lack of modern or contemporary case precedent affecting this area of the law proves that the law crafted early in the history of the federal courts has worked admirably in regulating the business and commercial interests associated with salvage. In short, the law as enunciated by Marshall,

Story, Johnson and Clifford has worked so well that the level of reported litigation has been kept to a minimum. Accordingly, the petitioners would suggest to the Court that there is no reason to alter or in any way modify this law. In other words, "if it ain't broke, don't fix it."

Only this Court has the Power to Effect this Change in the Law

The Fifth Circuit's rationale for finding for the respondents is clearly apposite the jurisprudence quoted above. This is not a case of erroneous findings of fact or misapplication of the law. The facts are not disputed nor did the court misapply good law. In this case, the Fifth Circuit decided the instant case contrary to the weight of two hundred years of jurisprudence of this Court and the admiralty courts of the nation, including its own decisions, and created a new rule of salvage law. In so doing, the Fifth Circuit has invaded the precincts of this Court and has decided a matter that this Court and this Court alone should establish.

This question raised by this writ application relates to the jurisdiction granted federal courts over admiralty and maritime jurisdiction. (Article III § 2, cl. 1, United States Constitution). This clause has been interpreted to be more than a grant of jurisdiction empowering the federal courts to entertain admiralty suits. This court has interpreted the clause to empower federal courts to draw on and develop the substantive admiralty law. But this Court has likewise found that Congress is empowered to revise and supplement with legislation admiralty and maritime law within the constitutional limits defined by this Court. *Romero v. International Terminal Operating Co.,* 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). While in theory the Fifth Circuit under

Romero, can develop the substantive law, that power is subject ultimately to the power of this Court as the admiralty law's chief architect.

Petitioners submit that based on its position as the chief architect of the admiralty law, this Court, and not a lower court, should be the author of a change in the law this wide-sweeping. As described in the next succeeding sections of this writ application, the rationale for this decision creates a sea change in the law and a concomitant change in the way business will be conducted. A change in the law of this magnitude is one that properly belongs to this Court.

Technological Revolution

In the last several decades, there has been a revolution in the technology used to retrieve sunken vessels and cargo. Side scan sonar has made it possible to image wrecks and sunken artifacts so that salvors can more readily find sunken property. Robot probes have allowed the sea to actually give up the wrecks of its dead mariners. Consequentially, vessels and artifacts either impossible to reach because of the state of the technology or hidden from detection are now being brought up from the deeps. This has in its turn required Congress, this Court and lower federal admiralty courts to deal with issues relating to the ownership of archeological artifacts, of vessels thought to be lost forever and of the ever-alluring sunken riches of Spanish treasure galleons. This Court has addressed issues concerning the powers of Congress, the powers of state governments and the power of federal Courts to adjudicate the ownership of salvaged property. In particular, this Court has been called upon to adjudicate disputes between state governments and voluntary salvors over the ownership of ancient shipwrecks and dis-

putes among salvors over the rights to famous shipwrecks such as the Titanic. We submit that the issue presented by this writ application is as important if not more so than the romantic salvage cases this Court has entertained previously. We submit that the importance of this area of the law to the shipping, insurance and salvage industries militates in favor of this Court exercising its supervisory power to review this decision.

Potential Effect on Interstate and Foreign Commerce

While the steel slabs in this case do not have the aura or mystique of the Titanic or the romance of a Spanish gold galleon, the issues surrounding their disposition bear on and significantly affect an area of maritime commerce that is certainly more important and more valuable to the current economy than the Grand Staircase of the Titanic or the plundered gold of the Incas. Data accumulated by the United States Department of Transportation, other federal agencies and private associations demonstrate that the large volume of commerce is exposed to the vicissitudes of the sea, and the dramatic, detrimental effect the Fifth Circuit's new salvage rule will have on these multi-billion dollar industries.

According to the United States Maritime Administration (MARAD) ninety-five percent of all oversea trade enters or leaves the United States via ships. According to the U. S. Foreign Waterborne Transportation Statistics released in the joint report of MARAD and the Corps of Engineers, the total value of waterborne imports and exports in 1999 was $672.614 billion. The Corps of Engineers December 1999 U. S. Waterway System-Transportation Facts reports that the tonnage on the Mississippi River between Minneapolis and the Mouth of the Passes was 324 million short tons annually. The tonnage from the mouth of the Ohio to Baton Rouge -

the stretch of river where this casualty occurred was 195.9 million short tons. See Appendix E.

Some of this cargo and the vessels carrying it are inevitably lost to the sea and rivers. In its year 2000 report, the International Salvage Union, a trade association representing salvors world-wide, reported that its members had salvaged in excess of $1 billion per year in international cargo and vessels since 1978. As is demonstrated by the foregoing data, the amount of commerce potentially affected by this change in the law is exceedingly large. Without the surety that the salvor must return salved cargo or seek compensation in Court, and without the assurance that a federal court will act to deter violations of this policy, the cargo and hull insurers will be required to minimize their risks with higher insurance premiums that in turn will be borne successively by the carriers and shippers and ultimately by the consuming public.

Balance of Interest

The law of salvage is in essence a balancing of three rival and competing interests: the public, the owner of the imperiled cargo, and the salvor. This Court ought to exercise its supervisory jurisdiction because the decision unhinges the delicate balance of interest that its precedents have struck among the interested parties. The early case law firmly settled this balance. Admiralty courts until now have scrupulously enforced the equilibrium. The Fifth Circuit decision by shifting that balance of power in favor of the salvor strikes directly at this equilibrium, which is at the very heart of salvage law itself.

The symmetry that the law seeks to obtain is first premised on the desire to encourage the potential professional salvor and the seafaring community in general to stop and render

assistance. The law that evolved out of this public policy seeks to minimize the losses that are an inevitable part of water-borne commerce and to foster the flow of commerce by imposing order and discipline in what is a difficult and dangerous enterprise. The aim of the law is to lessen the financial burden on the owner by returning his property to him and yet to reward the salvor for intrepid service.

The Position and Authority of Federal Admiralty Courts

Enforcing and implementing the balance between owner and salvor is one of the central concerns of the early case law. Central to maintaining this equilibrium among the rival interests is the federal admiralty court.

The initial error in the Fifth Circuit's decision is the removal of the federal admiralty court from its position as the ultimate arbiter of the salvage process. The Fifth Circuit's decision approves of a salvor retaining salvaged property and not advising the owner and then disposing of the property by selling for its own benefit to a party who knew the property belonged to others. Sanctioning this conduct essentially vitiates the function of the admiralty court as the overseer of the salvage process. If the salvor may retain and sell the property with impunity, then the federal court has no function in the process other than to rubber stamp the salvor's appropriation of the cargo or hull. Without the admiralty courts as guardians of the salvage policy, the public interest is jettisoned, salvaged property is fair game to sea-going scavengers and the free flow of commerce is impaired.

Dispensing with the necessity of applying to admiralty courts for relief denies the owners right to the return of his property. The law before this decision made the federal

admiralty court an indispensable arbiter before whom the parties establish their respective rights. This decision now permits the salvor at its sole discretion to secrete the cargo, sell it without the consent of the owner and then await the owner to discover the miscreances. Under this decision there is no incentive, even for the honest salvor, to return the property or seek compensation in Court. The incentive provided by this precedent is to quickly dispose of the property before discovery. Both the district court and the Fifth Circuit have in effect applied the law of "finds" to this case with the twist that the salvor and his purchaser are allowed to effectively obtain the ownership of the property without Court approbation.

Contrasting the Two Systems

The contrast between the two systems of law is stark and the results diametrically opposite. Consequentially, the benefits and burdens of the two systems are glaringly different. Under the traditional law the burden rests upon the salvor to either return the property or to institute legal proceedings in order to have any benefit whatsoever from the performance of its services. The rationale for this is obvious. The salvor has the property in his possession and in that sense has the upper hand on the owner or insurer. The law balances the power equation by burdening the salvor with the requirements of either settling with the owner or seeking redress from the admiralty court.

The law as changed by the Fifth Circuit no longer requires the salvor to return the property and displaces the federal court from the process until and unless the miscreance is discovered by the owner. In short, this decision rather than encouraging the salvor to guard and protect the rights and property of the owner actually fosters the exact opposite

behavior. Instead of protecting the property, it encourages or, should we say, emboldens the salvor to secrete the property and avoid the admiralty court.

While the consequences of this change are devastating to the interests of the owners, even more important is the inevitable mischief that this decision will inflict on commerce and trade in general. Under the Fifth Circuit's decision, owners and insurers can no longer be assured by black letter law that sunken and imperiled cargo and vessels will be protected by admiralty courts from plunder raids by seagoing opportunists such as American Eagle and purchasers like A.K. Steel. The result is that owners and insurers must take adequate means to protect imperiled cargo. Without adequate protection from the courts, owners and insurers will have to take steps to provide security, which means the incurring of expenses that until this decision were totally unnecessary. The result of this added expense is an inevitable increase in premiums to cover the additional expense of security. The cost of additional expenses, of course, is passed along until it is placed ultimately on the consuming public.

The new version of the law created by the Fifth Circuit actually precludes the owner from obtaining either the salved property or its full value, even should he be lucky enough to discover the misappropriation. The final irony is that under the Fifth Circuit's decision even discovery of the miscreance does not insure that the wronged owner or insurer will recover either the property or it value. On the contrary this decision allows a salvor and its purchaser, neither of whose hands were clean, to use a claim that never existed as a defense to a claim of conversion.

Viability of the Salvage Claim

The decision is logically antithetical to the reasoning process underlying the salvage law. According to the ancient jurisprudence and the Fifth Circuit's admission, American Eagle's salvage claim was never perfected. The respondents did nothing during or immediately after the salvage to perfect or preserve the claim. They neither returned the property or instituted an action for salvage. They could not perfect a lien against the property nor could they bring an *in rem* action because they sold and/or destroyed the property. They had no cause of action *in personam* against the owners/insurers for salvage because the petitioners never had possession of the property. If the respondents had brought an action for salvage against the petitioners even within the time limitations, the claim would have been dismissed under Rule 12 (b) (6) dismissal or Rule 56 summary judgment. There could be no *in rem* claim because there simply was no res, as the steel was converted into A. K. Steel's finished products. Moreover, there could be no action *in personam* as the underwriters never had the property in their possession. *Lambros Seaplane Base v. The Batory*, 215 F.2d 228 (2d Cir. 1954). In the logic of the salvage law, there was no claim that could be resuscitated.

The Fifth Circuit decision breathed life into the dead body of the respondents' salvage claim by holding that "asserting," that is, pleading the claim, is sufficient to instill life into what never existed. This decision makes no sense in the context of the salvage law. In essence, the Fifth Circuit opinion grants viability to a non-existent claim by allowing attorneys to plead it months and even years after the property was removed from the water, sold and destroyed in a blast furnace. Instead of analyzing the behavior of the salvor dur-

ing the course of the salvage operation and determining whether the salvor met its burden of establishing a right to an award, this decision literally allows lawyers to preserve the right to a salvage claim.

Actually, the law requires very little analysis of the salvor's conduct. All that the appellate and district courts needed to decide was whether the salvor, American Eagle, returned the steel to the petitioners or sought the aid of the admiralty court in resolving this dispute.

The Fifth Circuit misreads *Basic Boats, Inc. v. U.S.*, 311 F. Supp. 596 (EDVA 1970) supporting its version of the law. That case does not, in any sense, support the court's reasoning. The only reason that the U.S. Navy could successfully plead set-off was because it had returned the res to the owner. The question in this case is not and never has been staleness as the Fifth Circuit panel and the District Court perceived, but the very existence of a claim in the first instance.

Finally, the Fifth Circuit provided no factual basis for how the salvage claim was preserved, other than it was "asserted". Accordingly, the Fifth Circuit gives future litigants no guidance on what kind of conduct on the part of a salvor will be sufficient to assert a claim. Owners, insurers and salvors are all left adrift without a marker by which to navigate.

CONCLUSION

Petitioners do not believe that the Fifth Circuit's interpretation of the law is the kind of law envisioned by the Justices that crafted the rules of salvage law. In fact, the simple sentences of the Fifth Circuit's opinion unseam the very fabric of the law and open up a major area of commerce to chaos. In a way, this decision unwittingly institutes a salvage system reminiscent of the law of the ancient Gauls.

According to the ancient sources, the Gallic law allowed the finder to keep the property washed ashore and even to enslave an unfortunate crew that happened to survive a shipwreck or in some cases an ambush. The law of salvage was created in large measure to put an end to the kind of piratical behavior sanctioned by such laws.

What occurred in this case was exactly the kind of clandestine behavior that the salvage law was instituted to prevent. The removal and sale of the steel was a plain and simple embezzlement. Embezzlement is defined by Black as the fraudulent appropriation to his own use or benefit of property or money intrusted to him by another, by a clerk, agent, trustee, public officer, or other person acting in a fiduciary character. Black's Law Dictionary, p. 614, Revised Fourth Edition: (1968).

Since a salvor is an unsolicited agent (negotorium gestor) who owes the owner a fiduciary duty, the removal and sale of steel by these respondents was and remains an embezzlement, pure and simple. See *The Amethyst*, F. Cas. 330 (D. Me. 1840). Salvage law visits on the embezzler's right to recover an award a capital sentence. A capital sentence should be visited on A. K. Steel and American Eagle's right to assert a salvage claim in any form, because of the breach of their fiduciary duty. The salvor and the owner are not simply engaging in another business deal where the parties seek to maximize their benefit at the expense of the other. Salvage carries with it a solemn burden of trust under which the salvor is required by operation of law to act on behalf of the owner to insure he receives his property or its value. A salvor should never be allowed to take property, even derelict property, without the consent of the owner or the Court.

The case of *Falgout Bros. v. The S/V Pangaea*, 966 F. Supp. 1143 (S.D. Ala. 1997) provides a succinct exposition of salvage law and an exemplar of how a salvor and a court ought to handle these matters. The vessel was derelict, adrift, bereft of crew and when brought to port by the crew of the rescuing vessel was placed in the custody of the U. S. Marshal. The crew of the Falgoust Brothers' vessel then libeled the vessel *in rem* as required by law and sought to have the vessel declared abandoned. The vessel went unclaimed when advertised as required by the Court order. The Court declined however to declare the vessel abandoned, but awarded the crew a salvage award that would be satisfied out of a judicial sale of the vessel. What occurred in the *Pangaea* case clearly exemplifies the law of salvage. It describes the law as created and nurtured by this Court for two hundred years. Petitioners maintain that the actions of the Falgoust crew is the only way to properly retain a salvage claim. The Alabama district court's analysis demonstrates the correct reasoning process to apply to these types of cases. Petitioners believe that we have shown that the Fifth Circuit's opinion is antithetical to the letter and spirit of two hundred years of constant and consistent jurisprudence and accordingly this Court should exercise its supervisory power to review and reverse this decision.

In contrast to the reasoning and logic of the court in the *Falgoust Brothers v. The S/V Pangaea*, the decisions of both the Fifth Circuit and the district court appear to be premised on equitable considerations. The underlying reason for the decisions in this case was to allocate the cost of salvaging the cargo among the parties. Both courts seemed to have concluded that it would be inequitable for the petitioners to recover one hundred percent of the value of the steel in light of the expenditure of $500,000 in salvage costs in the

successful rescue of the cargo. The Courts each seemed to have concluded that to follow the rigorous, but clear mandates of the salvage law would have resulted in unjustly enriching the petitioners. In part this conclusion appears to have been bolstered by the mistaken assumption that the property would not have been rescued had not American Eagle performed the operation. Accordingly, the Courts below felt the need to balance the scales. In fact, from the beginning of the case, petitioners were willing to pay respondents a reasonable share of the cost of the salvage.

On the surface, this apportionment of the cost of salvage appears to be a felicitous resolution of the controversy in as much as the parties are each sent away bearing a portion of the loss. On deeper reflection, however, the fairness of the solution is revealed as highly suspect. In truth, neither decision effected substantial justice if balancing the ledgers were the object of a judicial action involving salvage. (The purpose of the action is not, however, allocation of liability for costs but rewarding intrepid service that preserves the owner's property.) A review of the break down of the numbers makes it patently clear that the petitioners were not equitably treated by the decisions. The petitioners paid nearly a million dollars for the steel and received a mere $37,000 for it under the trial court holding, hardly an equitable apportionment of the cost. The ultimate effect of the appellate court's reversal of the jurisdictional issue may unintentionally result in the petitioners recovering approximately $200,000 of the loss, still only a recoupment of little more than twenty percent. On the other hand, American Eagle was allowed to offset its entire expenses and retain the excess over expenses of $75,000. A. K. Steel was allowed to obtain the steel which had been originally consigned to it for a price considerably less than the original purchase price.

Viewed in this light from the prospective of the petitioners, the decisions are far from equitable.

While one can understand the reasoning behind the desire to balance the scale as far as American Eagle is concerned, that logic vanishes when one considers the role played by A. K. Steel in this case. A. K. Steel knew from the very outset of its negotiations with American Eagle that the steel slabs belonged to petitioners. A. K. Steel knew the vintage, quality and price of the steel. It knew that American Eagle had no idea about the price of the steel. To award A.K. Steel the benefit of the doubt under these circumstances is not equitable and completely misconstrues the facts.

But result and equity should not be the determinative basis of a decision with regard to salvage. The Fifth Circuit decision as in the case of most result-driven decisions wind up doing violence to the law and thwarting the reasoned policy underlying the law. In the case of salvage law, the policy and equitable result are already woven in the mandates of the law. The exclusive requirements established by the traditional law approved by this Court are intended to effectuate equitable results. The law over the last two centuries has been crafted in such a way that a just and equitable result is already factored in. Decisions of this type may momentarily affect a balance of perceived inequities, but in the end they lay the groundwork for dismantling a body of law. In this particular case, they open the door for discarding a body of law that has served the country and world well for two centuries.

The result of this case is not important in itself. What is important is the integrity and uniformity of the salvage law. Like it or not the Fifth Circuit's decision is now part of the body of the admiralty and maritime law of this country. It is now precedent for future result-oriented decisions that

will further erode the policy underpinning the law. The way is now open to scrap the time-honored principles of salvage law in favor of a system based on subjective appreciation of the facts. Most importantly of all, the system that is being created by this decision provides no standards by which the commercial community can judge what is permitted and what is not. In the future, worse facts than these will create even worse law. To allow the Fifth Circuit decision to remain in the body of the admiralty law is the first step in the creation of a body of law dependent on the arbitrary appreciation of the equities by individual courts. In the end it is the uniformity of the admiralty law that is jettisoned.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the
Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and AK STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN HENRY ADAMS, et al	*	Docket No.
	*	94-CV-1954-K
V.	*	New Orleans, LA
	*	June 18, 1998, 9:00 a.m.
UNIONE MEDITERRANEA	*	
DE SICURTA, et al	*	

EXCERPT FROM THE TRANSCRIPT
OF THE PROCEEDINGS HELD BEFORE
THE HONORABLE STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE PRESIDING

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer..

EXCERPT

THE COURT: This action was tried to the Court without a jury commencing June 15, 1998, and the Court, having thoroughly reviewed the record, the evidence adduced at trial, including deposition testimony, memoranda and the relevant law, hereby orally renders its order and reasons for judgment in open court. To the extent that any findings of fact are conclusions of law, they are adopted as such. To the extent that any conclusions of law are findings of fact, they are so adopted.

The matter concerns a quantity of sunken steel cargo which was lost in 1993 and subsequently salvaged in 1995. There are two primary areas of dispute before the Court. The first is an insurance coverage dispute and the second concerns a title dispute to the salvaged cargo.

On or about September 16, 1993, a cargo of 1,290 steel slabs was loaded aboard the M/V TURANDOT in Taranto, Italy, for transport to New Orleans, Louisiana. The slabs were manufactured in Genoa, Italy, by Ilva, S.p.A. ("Ilva") and consigned to Duferco, S.A., for resale in the United States. The vessel arrived in Darrow, Louisiana, on or about October 8, 1993. At Darrow the slabs were transhipped onto 16 barges owned and operated by Canal Barge Company ("Canal Barge") for further carriage to Cincinnati, Ohio. The barges that were used for this shipment were neither inspected by the U.S. Coast Guard nor classified by the American Shipping Bureau, Lloyd's Register, the Registro Navale Italiano, or any other certified-in-classification society. A.K. Steel Corporation ("A.K. Steel") of Middletown, Ohio (formerly known as ARMCO Steel Company) had agreed to

purchase the subject steel slabs from Duferco for use in the production of hot-rolled coils. The barges left Darrow under tow of the tug BILL ANDREWS on October 12, 1993.

Canal Barge, the barge carrier, procured open cargo/shippers' interest policy of insurance with plaintiffs, evidenced by Certificate of Insurance No. 8455, to cover the inland transport of the slabs from Darrow, Louisiana, to Cincinnati, Ohio. The policy was effected with plaintiffs through Global Special Risks, Inc. ("GSR"). Canal Barge was the named insured on plaintiffs' policy, while Duferco was named as an additional assured.

On October 16, 1993, barges CBX-207 and CBX-214 sank in the lower Mississippi River near Vicksburg, Mississippi, and the cargo was lost. The cargo aboard those two barges consisted of approximately 158 slabs, valued at $922,589.82. Duferco owned the steel slabs at the time of the sinking.

Both Duferco and Canal Barge had insured the steel cargo during barge carriage upriver. Duferco had declared the subject shipment of 1,290 steel slabs under Open Cargo Policy No. 1381/111, which it had procured on August 31, 1993, from UMS Generali Marine, S.p.A. ("UMS") providing coverage for a cargo for transport to the United States. The policy of insurance was written and issued by UMS, an Italian insurance company, at its principal place of business located in Genoa, Italy, and delivered to Duferco, S.A., a Swiss company, at its offices in Lugano, Switzerland.

After the accident Duferco notified UMS of the loss by letter dated October 18, 1993, and included a preliminary

notice of claim against UMS. Duferco subsequently made a statement of claim which UMS received on November 3, 1993. UMS Exhibit 8, Plaintiffs' Exhibit 13. Immediately after the loss UMS retained legal counsel and marine surveyors to investigate the casualty and explore the possibility of salvaging the steel slabs. UMS maintains that its participation in any salvage attempt was on a "without prejudice" basis by virtue of its own statements to that effect and provisions of Italian law. Italian Civil Code Article 1914.

Duferco hired the Italian Claims Agency ("ICA") as its agent for purposes of coordinating salvage of the cargo, among other things. ICA in turn hired American Eagle Marine, Inc., ("American Eagle") to salvage the steel pursuant to a salvage contract entered on January 31, 1994. Plaintiffs' Exhibit 24. In connection with the salvage effort, UMS advanced to Duferco certain sue-and-labor costs for the salvage effort, which totaled $191,000. UMS Exhibit 7. UMS urged Duferco to make a claim for insurance against Canal Barge and plaintiffs as early as November 25, 1994. Plaintiffs' Exhibit 17.

UMS denied coverage of the claim on March 14, 1995, per letter addressed to Duferco. UMS stated the following reasons for denial of the claim:

"One of the most important point (sic) which were considered when the policy -- contract was underwritten was your commitment to load your cargo on board of adequate high standard means as per our particular instructions and mutual agreement."

"As you have unfortunately unattended this warranty, we cannot accept and settle your claim, mainly for the above reasons, in addition to the other ones explained to you during the meeting."

UMS Exhibit 8, Plaintiffs' Exhibit 23. By this letter it appears that failure to warrant proper loading was the main reason for denial of coverage. On March 23, 1994, Duferco wrote back and mentioned the other reasons for denial of the claim that were discussed "during the meeting" which took place prior to the March 14, 1994 denial by UMS. Plaintiffs' Exhibit 24. Duferco mentioned its delay in abandoning the cargo and, based on this letter, the inference can be drawn that Duferco put off abandoning the cargo while its attempt to salvage the cargo was ongoing. In this letter Duferco also communicated its intention to claim indemnity directly from Canal Barge based on its policy with plaintiffs and further stated, "Should these insurers reject in full or in part our claim, we shall he forced to return to you on the subject." Id.

UMS did not deny coverage under the policy based on Duferco's failure or inability to properly abandon the cargo, nor did UMS state that under the special circumstances of this case there was never any coverage. There is no evidence that UMS invoked this defense in its March 14, 1994 denial of the claim or that it was discussed at the meeting prior to the denial, when other reasons for denial of the claim were given.

Even if the impossibility of abandonment was discussed, the abandonment defense was not important enough to UMS for it to include in the letter denying coverage. Instead, and in stark contrast to its position today, UMS' use

of the term "total loss" in its March 1994 letter of denial evidences UMS' interpretation that a "total loss" could be and was made by Duferco. UMS begins its letter denying the claim by mentioning the claim for total loss:

"We refer to the above damage and to the claim for $926,369.19, which you sent on November 3, 1993, about the total loss of M/T 3,062,040 of slabs..."

Plaintiffs' Exhibit 23. UMS used the term "total loss" without qualification and failed to mention that the UMS policy and Italian law may preclude Duferco from declaring the sunken cargo as a "total loss." The only issue at the time of denial referencing abandonment was when Duferco might abandon the cargo, not whether Duferco could abandon the cargo as a "total loss" under the UMS policy and Italian law.

Once UMS denied coverage on the claim, Duferco sought recovery from plaintiffs' policy. As mentioned, UMS urged Duferco to claim against plaintiffs and Duferco notified UMS of its intent to do so per its letter of March 23, 1994.

Between January 31, 1994, and July 6, 1994, American Eagle made no attempt to salvage the cargo. Doug Adams, who testified on behalf of American Eagle, stated that the water was too high to salvage the property in the early part of 1994. On July 6, 1994, ICA canceled the salvage contract with American Eagle. Plaintiffs' Exhibit 27. Victor Bruzzone, who testified on behalf of ICA, stated that he was instructed by Duferco to cancel the salvage contract so that Duferco could declare the cargo as a constructive total loss.

Per letter dated July 6, 1994, ICA canceled the salvage contract with American Eagle and explained that "We are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." Plaintiffs' Exhibit 27. Bruzzone testified that Duferco had not told him that they were "abandoning" the cargo; rather, Bruzzone picked up the term "abandon" from an attorney acting on behalf of Duferco. According to Bruzzone, the purpose of the letter from ICA was to simply cancel the contract for salvage; the letter put American Eagle on notice of Duferco's intent to abandon the cargo.

Doug Adams testified that when he received the letter he understood that the contract was canceled and that Duferco was abandoning the cargo. Several weeks later, per letter dated July 28, 1994, Duferco notified Canal Barge and its attorneys that it was abandoning the cargo and requested that Canal Barge notify its underwriters of same. Plaintiffs' Exhibit 28. The notice of abandonment did not specify that Duferco was abandoning the cargo to plaintiffs.

Meanwhile, Canal Barge had made a claim of insurance against plaintiffs based on its policy of insurance and plaintiffs filed a declaratory judgment action on June 10, 1994, against Canal Barge, UMS, Duferco, Ilva and A.K. Steel seeking determination of the rights and liabilities of all parties with respect to the contracts of insurance. The Court notes that Ilva, Canal Barge and Duferco are no longer parties in this litigation.

Duferco abandoned the cargo on July 28, 1994, and plaintiffs refused to accept the abandonment until

February 1, 1995. Plaintiffs, Exhibits 30 and 40. On July 28, 1994, Duferco confirmed that it owned the sunken cargo at the time of the loss and notified Canal Barge and its underwriters that it had abandoned the cargo because "the salvage of the cargo was impossible due to river conditions." Plaintiffs' Exhibits 28 and 30. A.K. Steel confirmed that it did not own the sunken cargo and assigned any and all of its rights to the sunken cargo to Duferco. Plaintiffs' Exhibit 34. Plaintiffs refused the abandonment, as evidenced in pleadings filed with the Court on August 23, 1994. Record Document 4, American Eagle Exhibit 5.

In response to the Court's September 13, 1994 ruling, plaintiffs made partial payment to Duferco in the amount of $986,352.41 (representing payment of principal, less deductible, plus interest) in exchange for an assignment of Duferco's rights, if any, against UMS. Plaintiffs' Exhibit 40 and 42. Plaintiffs and Duferco executed an Assignment and Subrogation Receipt in return for payment on the claim which was signed on January 25, 1995, and executed on February 1, 1995. Id.

By its terms, the Assignment and Subrogation Receipt provides "You are entitled at your option to take over our interest in whatever may remain of the goods, it being understood that delivery to you of the document of title relating to the goods shall not be construed as an exercise of such option." Plaintiffs' Exhibit 40. On February 1, 1995, Duferco transferred any and all of its ownership interest in the cargo to plaintiffs.

The Court finds that Duferco abandoned the cargo to

plaintiffs on July 28, 1994, which abandonment became effective with the transfer of title to plaintiffs on February 1, 1995. Duferco abandoned to plaintiffs, not UMS. Duferco did not obtain the written consent of UMS prior to execution of the Assignment and Subrogation Receipt.

The testimony of Mr. DeOrchis, attorney for Duferco, confirms that as of February 1, 1995, plaintiffs "owned" the sunken cargo. According to Mr. DeOrchis, Duferco wished to purchase the sunken cargo in late February or early March 1995. At that time the steel market was up and Duferco expressed its interest in purchasing back the sunken cargo from plaintiffs, who failed to respond to Duferco's inquiry. Though DeOrchis' testimony confirms that plaintiffs owned the cargo, it also confirms that plaintiffs made no effort to sell the sunken cargo. Michael Garin of Global Special Risks testified that plaintiffs had no intent of salvaging the cargo and took no steps to assert ownership to the sunken cargo prior to April 1995.

Meanwhile, American Eagle prepared to attempt salvage anew. Doug Adams, on behalf of American Eagle, testified as to the salvage of the steel in 1995 and the sale of the steel to A.K. Steel. Adams testified that he knew that Duferco had abandoned the steel based on the letter he received from ICA back in July 1994 cancelling the original salvage contract. At the time Adams was preparing to perform some other salvage jobs on the Mississippi River near Vicksburg in the area where the cargo sank. He remembered that the steel was still there and thought he might be successful salvaging it at this time. Adams saw the opportunity to get some more work in the area where he planned to have

his employees and equipment mobilized to perform the job. Adams had mentioned the possibility of salvaging Duferco's steel to his lawyer and he knew that he could not warrant title but merely the salvage rights to the steel.

American Eagle first contacted A.K. Steel regarding their interest in salvaging the sunken cargo in January 1995. Adams worked together with Fran Empey, a joint venturer, in the salvage, who testified at trial. Though both Adams and Empey knew that Duferco had previously owned the abandoned steel, neither knew initially that A.K. Steel had purchased the steel from Duferco. Rather, they contacted A.K. Steel on their own as a potential purchaser of the steel. Empey, at least, learned in talking to A.K. Steel that it had been the purchaser of the steel.

Initially Adams expected to sell the salvaged cargo for scrap. In his discussions with A.K. Steel and a number of other companies, however, Adams learned that the steel was more valuable than scrap and could fetch a higher price. Adams and Empey both testified that in order to know the market value of the steel a potential purchaser must know the chemistry of the steel in order to determine its application and value. The so-called "chemistries" are proprietary in nature. A.K. Steel, having purchased and possessed identical steel from Duferco, was in possession of those chemistries.

Empey testified that he contacted Duferco Steel, Inc., in the United States in an attempt to obtain the chemistries to the steel, but there was no testimony that this effort proved successful. Duferco Steel, Inc., relayed a message to

Duferco in Lugano on March 3, 1995, asking whether it could give away the steel chemistries to salvors or whether to refer them to the insurance company. A.K. Steel Exhibit 25. Duferco responded the next day granting permission to give away 'the chemistries. Id. By this exchange, Duferco was apparently not interested in purchasing the salvaged steel. More importantly, Empey testified that he did not receive a response from Linda Mertz.

According to both Adams and Empey, A.K. Steel made the only acceptable bid on the steel. on January 9, 1995, A.K. Steel offered to purchase the steel from American Eagle for $150 per ton. Plaintiffs' Exhibit 54. A.K. Steel did not demand that American Eagle warrant title to the slabs. One of the terms of its original offer, A.K. Steel requested American Eagle will "warrant and document that the slabs have been abandoned for salvage by the owner/underwriters." Lynn Riley confirmed in her deposition testimony that A.K. Steel wanted warranty of abandonment only, that it never demanded warranty of title, and that the documentation of ownership and abandonment supplied 'by American Eagle was satisfactory.

There was one higher offer of $180 per ton from David J. Joseph Company. A.K. Steel Exhibit 12. Ted Ernstberger testified on behalf of David J. Joseph Company. He stated that his company, which was A.K. Steel's scrap broker at the time, insisted that American Eagle warrant title to the steel, a term that American Eagle refused to accept. Adams knew that he could not warrant title to the salvaged steel, so A.K. Steel, which offered to purchase American Eagle's rights of possession to the salvaged steel, made the only acceptable

bid. As it turned out, A.K. Steel purchased the steel for approximately $176 per net ton pursuant to a purchase order dated March 8, 1995.

American Eagle commenced salvage on February 18, 1995, successfully completed salvage on April 26, 1995, and received final payment for the steel on April 27, 1995. American Eagle successfully salvaged 128 of the 158 sunken slabs. 127 of those slabs were sold and delivered to A.K. Steel and American Eagle kept the remaining slab.

Plaintiffs did not assert ownership interest in the steel until after the salvage operation was completed. There is no evidence that plaintiffs had any intent of asserting ownership, selling or salvaging the sunken cargo. Plaintiffs first learned of the salvage operation on April 24, 1997. Robert Lemon, counsel for Canal Barge, testified that on April 24, 1997, he phoned plaintiffs' counsel to inform him that the cargo was being salvaged. Robert Lemon testified he learned about the salvage from his client, Canal Barge. Adams confirmed that he called Canal Barge to inquire whether it was interested in salvaging its sunken barges.

Three days later, on April 27, 1995, plaintiffs wrote to various underwriters that it had "just learned" that American Eagle was on site and salvaging the sunken cargo without plaintiffs' consent. Plaintiffs' counsel requested authorization from plaintiffs to put American Eagle on notice of plaintiffs' ownership and title to the steel slabs, explaining that the slabs were then worth more than plaintiffs had paid for them. Plaintiffs stated that American Eagle's salvage would give

rise to a claim for salvage award, and added that plaintiffs "would have had to raise the steel slabs anyway at a significant cost to underwriters." American Eagle Exhibit 14. That same day plaintiffs' counsel put American Eagle on notice of its "right, title and interest in the steel slabs and claims that ownership." American Eagle Exhibit 15.

Adams confirmed that American Eagle did not halt delivery of the steel to A.K. Steel in response to plaintiffs' notification. A.K. Steel consumed the steel slabs, despite plaintiffs' notification of ownership and request not to do so. Neither American Eagle nor A.K. Steel offered the salvaged cargo to plaintiffs at any time and neither perfected a salvage lien or title action prior to plaintiffs' quiet title action which was filed on August 15, 1995.

The Court finds no bad faith on the part of American Eagle or A.K. Steel for the actions each took in salvaging, selling and purchasing the steel. First, Adams' testimony confirms that he knew that the salvaged steel had been abandoned by Duferco in July 1994. Adams knew that if he salvaged the steel he could claim a possessory right of salvage only since he did not own the steel. Adams specifically chose the one purchaser who agreed to this term, namely that American Eagle only warrant abandonment of the cargo but not warrant title. Adams accepted a significantly lower bid in order to obtain this term because the higher bidder insisted on warranty of title, which Adams knew he could not do. Likewise, A.K. Steel purchased the salvaged steel without warranty of title, assuming the risk that its title to the steel could be challenged by plaintiffs.

The Court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle and that American Eagle would not have bothered to salvage the cargo were it unable to line up an acceptable purchaser in advance of its efforts. American Eagle successfully salvaged 128 slabs of steel, and did so in good faith, notwithstanding American Eagle's failure to halt delivery of the salvaged steel to plaintiffs on April 27, 1995, upon their assertion of ownership. A.K. Steel purchased the salvaged steel in good faith without warranty of title and immediately consumed the steel into production.

The Court finds no "bad faith" on either American Eagle or A.K. Steel based on their unresponsiveness to plaintiffs' demand that sale, delivery and consumption of the salvaged steel should halt at the instant it asserted its ownership interest. The letter of July 6, 1994, stated that the cargo was abandoned. Significantly, the letter did not provide that the cargo was abandoned to underwriters or anyone else.

The Court heard testimony on the nature and difficulty of the salvage operation. It is uncontested that American Eagle received $525,424.32 from A.K. Steel for the salvaged steel slabs, that American Eagle expended $450,198.91 in the salvage effort and netted a profit of $75,225.41. J. Kenneth Edgar offered expert testimony on the salvage operation undertaken by American Eagle. Edgar opined that the expenses incurred by American Eagle were reasonable based on the nature and complexity of the salvage. Edgar explained that the vessel sank atop one of the sunken barges,

making the salvage operation more difficult and subjecting the operation to further changes in weather and river conditions. Both Edgar and Adams noted that the barges were covered by sand and silt, that river traffic and changing currents added to the risk and difficulty of performing the job.

Adams explained the significant danger and skills involved in doing the job. Divers outfitted with air tanks were required to decompress, descend a tube 30 inches in diameter, which delivered them to the sunken barges that were submerged 60 feet underwater. There the divers labored amid the silt and sand in the muddy water with virtually no visibility whatsoever. There is no doubt that the salvage effort required considerable skill, daring, risk and hard work.

Plaintiffs offered no evidence that the salvage effort was negligently performed, that the salvage expenses were unreasonable, that the job could have been more efficiently, easily or successfully performed. On cross-examination Adams admitted that the waters might be lower at a different time of year, but remarked that such advantage would have been offset by the facts that American Eagle was mobilized to perform the salvage work when it did, since it had other jobs in the area during that period, and that the cargo would have sunken to further depths over time, rendering any salvage task more difficult.

Adams took the initiative to salvage the sunken slabs and bore the risk, difficulty and expense involved. Absent Adams' efforts, there would be no steel to claim since plain-

tiffs evidenced no interest salvaging the steel until after it surfaced. The Court notes that apart from a generic threat, plaintiffs took no emergency legal action back in May 1995 to gain possession of the cargo, halt delivery or prevent consumption.

The Court heard expert testimony on the value and quality of the steel. George Hynson, testified that the value of the steel at the time of salvage was approximately $341.90 per metric ton, F.O.B. Vicksburg. This value reflects the so-called "spot market" price, a term which refers to market prices for steel available at that time, which vary from pre-arranged, negotiated steel prices. Hynson acknowledged that this figure could be downwardly adjusted by several factors:

First, converting the "per metric ton" price to a "per net ton" price reduces the figure to $307.71 per net ton.

Second, Hynson's price did not deduct freight charges from New Orleans to Vicksburg in the amount of $3.00 per ton, which reduces the price to $303.71 per ton. This mobilized to perform the salvage work when it did, since it had other jobs in the area during that period, and that the cargo would have sunken to further depths over time, rendering any salvage task more difficult.

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Second, Hynson's price did not deduct freight charges from New Orleans to Vicksburg in the amount of $3.00 per ton, which reduces the price to $304.71 per ton. This figure is not far off from competitive "spot market" prices around the time for steel with known chemistries to the purchaser. A.K. Steel received "spot market" price quotes in May 1995 ranging from $250 up to $300 per ton, depending on manufacturer, quality and terms of delivery. Plaintiffs' Exhibit 93. The Court finds, based on Hynson's testimony and the documents in Plaintiffs' Exhibit 93, that the $300 figure is the value per net ton of the steel before adjustment for the chemistries factor.

Third, Hynson testified that if the chemistries to the steel slabs were unavailable the price could be reduced by 5 to 20 percent. Based on Empey's testimony, only A.K. Steel

and Duferco possessed the chemistries to the steel. The Court finds it appropriate to reduce the steel price by 20 percent based on the facts that the steel was salvaged and, though not impaired from submergence, any purchaser would be concerned about the possible damage from submergence or salvage, and any purchaser except A.K. Steel or Duferco would have had to test the steel in order to determine its value. Accordingly, the Court finds that the steel's "spot market" price at the time of salvage was approximately $240 per net ton. Thus the Court finds $240 per net ton a reasonable valuation of the sunken cargo at the time of salvage. A.K. Steel paid American Eagle $176 per ton for possession rights to the steel.

The Court finds that. the salvaged steel was not defective. Michael Monaco, an expert metallurgist, testified that there were no defects in the steel attributable to freshwater exposure. Monaco testified that the slabs were in prime condition, conceding some slight allowance for chemical defects in the range of 2 percent. Of the 10,444 Ilva slabs consumed, A.K. Steel reported 44 defects, so-called "cobble defects." There were 24 instances of finishing mill cobble and 20 instances of pipe cobble. "Pipe cobble" is a defect which occurs during casting and so-called "finishing mill cobble" is a defect which occurs at the coil production stage. A.K. Steel purchased cast steel and finished into steel coil; thus, A.K. Steel is responsible for introducing finishing mill cobble, but would not be responsible for the existence of pipe cobble defects. A.K. Steel reports that 20 of the first 5,660 slabs contained pipe cobble defects. A.K. Steel contends that the salvaged steel contained an unusually high percentage of pipe cobble and was, therefore, defective when

obtained by A.K. Steel.

The Court rejects A.K. Steel's contention on the basis of Monaco's testimony. Monaco agreed that A.K. Steel experienced a high rate of cobbling, but opines that the defect is more likely attributable to a finishing production than casting production. As Monaco explained, only 20 of 10,444 Ilva slabs contained the pipe cobbling. All 20 slabs containing the defect belonged to the first 5,660 slabs processed by A.K. Steel. There were no defects in the remaining 4,774 slabs. Monaco hypothesized that the pipe cobbling reported by A.K. Steel may have, in fact, resulted from a production error which was eventually corrected and resulted in the nonoccurrence of defect in the subsequently processed slabs. Additionally, Monaco testified that A.K. Steel received only two customer complaints referencing the Ilva steel, which is excellent in the industry.

The Court does not give much weight to the opinions of Johannes Schade, an expert witness who testified that the steel was defective. Although Schade stated that there was a high rate of pipe cobble defects in the steel, he is not a finishing mill expert and. the tests he performed were either inconclusive or not recorded and made available to plaintiffs' expert. Schade agreed, that the customer complaints on Ilva steel was low. In sum, the Court finds that the steel was not defective. Though the possibility of perceived defects may have affected what A.K. Steel's subjective valuation of the steel was at the time, this would not have affected the market value of the steel.

The Court has subject matter jurisdiction in this case

pursuant to 28 U.S.C. 1331(l) and Rule 9(h) of the Federal Rules of Civil Procedure. Italian law governs interpretation of the UMS policy as to the nature and extent of coverage.

UMS denies that its policy covers the loss on five grounds which the Court addresses in turn. Although plaintiffs paid Duferco for this cargo loss and took assignment of Duferco's rights under the UMS policy, they acquired no greater rights than those previously held by Duferco.

Considering the evidence, including the provisions of the UMS policy, the testimony of plaintiffs' expert on Italian law, Carlos Mastellone, and the testimony of UMS' expert on Italian law, Professor Alredo Dani, the Court concludes that UMS' defenses lack merit or have been waived. Therefore, UMS' policy provides coverage for this loss and UMS shall be required to pay its pro rata share of the loss which the Court has already determined to be four-fifths of the loss.

First, UMS contends that Duferco failed to abandon the cargo to UMS within the statutory limit. This ground consists of two elements: First, that abandonment was untimely; and, second, that Duferco could not abandon the cargo which sank with the two barges as this would be a "partial abandonment," which is not permitted under Italian law and the UMS policy. Article 11 of the General Conditions of the UMS policy provides that Duferco may abandon the goods to UMS and demand indemnity for total loss in the cases provided for by Article 541 of the Navigation Code. There is no doubt that any abandonment by Duferco was timely as both

ten months from the time of the accident in which to abandon the goods. Duferco abandoned the sunken cargo to plaintiffs on July 28, 1994, which was less than ten months of the accident on October 16, 1993.

The remaining contention is that Duferco was not permitted to abandon the cargo as a "total loss" under the terms of the policy and based on Italian law. This explanation requires the examination of Article 541 read in coordination with Articles 540 and 545. Article 541 provides:

"The insured can abandon to the insurer the goods and request the indemnity for total loss in the following cases:"

"(a) When the goods are totally lost;"

"(b) When the ship is presumed lost;"

"(c) When in the cases foreseen in '(a)', of the preceding article, from the date of the loss or of the unseaworthiness of the vessel, three months have elapsed for the perishable goods or six months have elapsed for those not perishable without the goods having been recovered and loaded for the continuance of the voyage;"

"(d) When irrespective of any expenses whatsoever the damages for deterioration or loss in quantity exceeded three-quarters of the insurable value."

According to Professor Dani, Duferco cannot abandon the cargo as a total loss under Article 541. First, he stated that Duferco cannot invoke Article 541(d) because the

sunken cargo on the two barges did not exceed three-quarters of the insurable interest. Second, he states that loss of the two barges is not a "total loss" because it was not the whole shipment, i.e., all 16 barges were not abandoned. According to Professor Dani, Italian law does not recognize as a total constructive loss the loss of two of the 16 barges and partial loss is only applicable where the loss exceeds the insurable interest. Article 545 provides:

"The abandonment of the things insured must be effected without conditions.

"It must include all the things under risk for the insurer at the moment of the accident from which the abandonment arises and the rights belonging to the insured towards those third parties in relation with the same things.

"If the insurance does not cover the entire insurable value of the thing, the abandonment is limited to a part of the thing itself in proportion of the insured amount."

Professor Dani's reading of the Navigation Code produces an absurd result; namely, that Duferco could only recover for the cargo lost on two sunken barges by abandoning the entire shipment, i.e., all 16 barges. Further, Professor Dani states that Duferco does not have a claim for average since there was no damages to the steel. Under Professor Dani's view, the policy covers one shipment, which includes all the cargo; the way to avoid such an absurd result, according to him, is to separately declare each barge under the policy.

Mastellone interjects common sense into his reading of the code, giving effect to the concepts of reasonableness, fairness and protection of the insured. First, according to Mastellone, the transhipment of the steel from one ocean-going vessel to 16 barges renders it possible to view each sunken barge as a "total loss." This reading is not explicitly supported by the code. At the same time the UMS policy clearly contemplated inland river transport by barge, so it would be unreasonable to assume that the individual barges were not at risk of damage or sinkage. To believe that the code definition of "total loss" requires a minimum loss of 12 barges and perhaps all 16 barges strains every notion of reasonableness, equity and fairness.

Mr. Mastellone testified that the concept of equity, which he termed "reasonableness," weaves throughout the insurance code. Moreover, he testified that like in the United States, the law of insurance is designed to protect the of the insured. Certain code articles lend support to these concepts. For example, Article 545 permits partial a thing that is under-insured limited to that portion which is insured. This example produces an equitable result, namely, pairing the extent of coverage with the extent of the loss and thereby preventing waste as unfairness.

More importantly, the Court concludes that UMS waived the abandonment defense. Mr. Mastellone testified that Italian law recognizes the concept of waiver in connection with an insurance defense. The testimony was uncontradicted by Professor Dani. Though not discussed by the

Italian law experts, Article 546 provides one example of waiver of the abandonment defense. Article 546 provides that an insured is entitled to collect the indemnity for total loss if the abandonment is not objected to within 30 days.

The Court found facts which support a waiver of the abandonment defense. First, UMS did not offer the abandonment defense in connection with denial of coverage of the claim on March 14, 1994. The Court construes this omission as a recognition by UMS that a constructive total loss of one barge was covered according to the mutual intent of Duferco and UMS. This left Duferco with but one option, to claim against plaintiffs. Duferco was required to abandon the cargo in favor of plaintiffs in order to declare a constructive total loss under plaintiffs' policy. Duferco could only abandon to one insurer and UMS did not object to the abandonment to plaintiffs. Additionally, there is some authority under Italian law that Duferco's notice and filing of claim can be considered an effective notice of abandonment of the cargo by Duferco to UMS. This Court concludes as a matter of law that UMS waived the abandonment defense and cannot assert it as a coverage defense against plaintiffs, and the intent of the parties was that the policy provided coverage if a constructive total loss occurred to the cargo in any of the barges.

Second, UMS argues Duferco breached the classification warranty in the UMS policy. The Court concludes based on its reading of the UMS policy that Duferco did not warrant to classify the barges. UMS submits that the policy creates a warranty that Duferco classify the barges:

"The insurance is provided subject to the condition that the transport, in relation to the marine voyage, be effected on ships or vessels in steel, classified in the first class of the Registro Navale Italiano or one of the following classification registers." UMS Policy General Conditions, Article 4.

UMS argues that Article 4 creates a warranty that the barges carrying the steel upriver be certified in class, that barges CBX-214 and CBX-207 were not certified in class and, therefore, that UMS is entitled to deny coverage on Duferco's claim for insurance. It is well established a breach of warranty contained in an insurance policy allows the insurer to avoid the contract of insurance. Thomas J. Schoenbaum, Admiralty and Maritime Law, §19-8, p. 424, (2nd ed. 1994) (hereinafter "Schoenbaum"). A "warranty" is a condition in the contract whereby the assured represents that something will or will not be done or states a condition to be fulfilled. Id. The terms of the warranty requires exact compliance. Id.

The warranty relates to "transports in relation to the marine voyage." The Court concludes that Article 4 does not apply to river barge transports. Other provisions of the UMS policy distinguish between a "marine journey" and a "journey on internal waters" and specifically refer to "river lighters." See, e.g., UMS Policy General Conditions, Article 11, and UMS Policy Special Agreements, Article 6. Such examples imply that a "marine voyage" does not refer to transport on "inland waters" or "rivers." The UMS policy appears to distinguish between river and marine voyages and Article 4 only refers to marine voyages. For this reason the Court concludes that Article 4 does not apply to barge

carriers hired for inland river transport. Accordingly, the Court rejects UMS' denial of coverage on grounds that Duferco failed to comply with a warranty of the policy.

Third, UMS claims that the negotiation of the Certificate of Insurance by Duferco to A.K. Steel precludes any claim against UMS under Open Cargo Policy No. 1381/111. There is no merit to this defense. It is an undisputed fact that Duferco owned the steel slabs at the time of the accident and that A.K. Steel had purchased the slabs C.I.F. upon arrival in Cincinnati. The fact that A.K. Steel may have had in its possession a copy of the original Certificate of Insurance at the time of the accident is not important. Both Italian law experts testified that Duferco, not A.K. Steel, possessed the insurable interest in the steel slabs until title passed to A.K. Steel upon arrival of the cargo in Cincinnati. Title to the sunken cargo did not pass to A.K. Steel.

Both experts agreed that Duferco possessed title to the cargo, the insurable interest, and was the only party which could claim under the UMS policy. The fact that the original Certificate of Insurance may have been in the possession of A.K. Steel or its bank (for purposes of arranging financing of the sale of the cargo) is a ministerial detail which could have been cured in order to perfect a claim under the UMS policy, according to Professor Dani. According to the testimony of Lynn Riley, A.K. Steel merely wanted evidence that the cargo was insured by Duferco. It acknowledged that title to the steel did not pass to it until the steel was off-loaded in Cincinnati. In sum, Duferco, not A.K. Steel, was the proper party to claim against UMS and the Court rejects UMS'

third coverage defense as unfounded.

Fourth, UMS claims that Duferco failed to safeguard UMS' rights against third parties when it signed the Assignment and Subrogation Receipt in favor of plaintiffs as required under Article 10(g) of the UMS policy, which provides:

"In the event of a loss the contracting party and/or insured must:"

"(e) perform, taking account of the legal and contractual periods, all acts necessary to protect the rights of recourse against any person responsible."

The Assignment and Subrogation Receipt executed by Duferco in plaintiffs' favor includes rights against Canal Barge, rights which plaintiffs are precluded from obtaining as a matter of law (i.e., plaintiffs cannot subrogate against their own assured, Canal Barge). UMS cites authority to the effect that insurers may deny coverage for failure of the insured to safeguard their right against third parties. See O'May on Marine Insurance Law (1993), at pp. 488-489. UMS asserts "this rule is especially pertinent in cases (such as this one) which involve loss of cargo, since relatively short time limits for commencement of suits against carriers apply." Id. The Court concludes that this rule is particularly inapplicable to this case and that Duferco did not sacrifice its rights under the policy by its failure to "safeguard" the rights of UMS against Canal Barge. UMS denied coverage prior to execution of the Assignment and Subrogation Receipt, at which time the foreseeability of settlement with plaintiffs was foreseeable to all parties involved.

As a prudent uninsured, Duferco could not reasonably have been expected to independently pursue an expensive and perhaps unfounded suit against Canal Barge. Moreover, UMS could have itself preserved its rights against Canal Barge as both UMS and Canal Barge were named parties in plaintiffs' action for declaratory judgment litigation as early as June 10, 1994, prior to the date of abandonment of the cargo by Duferco to plaintiffs and the negotiation of the Assignment and Subrogation Receipt.

UMS eventually did assert a cross claim against Canal Barge, alleging that the cargo loss was caused by the unseaworthiness of the barges owned by Canal, Canal's negligence and/or its breach of bailment obligations. The Court dismissed UMS' cross claim against Canal Barge as time-barred pursuant to §1303(6) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1303(6), which provides a one-year limitations period in which to bring cargo claims. COGSA §1303(6) provides:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Thus, UMS itself failed to perfect any claim against Canal Barge, not Duferco. The Court concludes that the defense based on Article 10(e) of the UMS policy lacks merit and does not provide a basis for denial of coverage under the UMS policy.

Finally, UMS claimed that Duferco failed to get written

consent from UMS prior to payment by plaintiffs as required under Article 10(g) of the UMS policy, which provides:

"In the event of a loss, the contracting party and/or insured must:"

"(g) ... refrain from entering into arrangements and/or receiving any indemnity whatsoever without the prior written consent of the insurer."

According to Professor Dani, once UMS denied coverage under the policy, Duferco had a duty with respect to UMS to act as a prudent uninsured. UMS was fully aware that Duferco would seek recovery from plaintiffs. There is no reason to believe that this provision applied with equal force after UMS denied coverage and Duferco sought recovery under plaintiffs' policy.

The Court's admiralty jurisdiction includes jurisdiction to determine title to the salvaged steel, 28 U.S.C. 1331; California v. Deep Sea Research, Inc., 118 S.Ct. 1464, 66 U.S.L.W. 4286 (April 22, 1998) (holding that the Eleventh Amendment does not bar the admiralty jurisdiction of a federal court over the property that is not within the state's possession). The Fifth Circuit "has repeatedly given fullest play to the concept that admiralty jurisdiction embraces the resources of equity whenever the need arises." See Custom Fuel Serv. v. Lombas Industries, Inc., 805 F.2d 561, 566 (5th Cir. 1986).

The law of salvage applies to this case rather than the law of finds. Application of the law of finds, which vests

title in the subject res to the finder, is reserved for those rare cases where the owner is deemed to have abandoned his claim of title to the res. See Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145, (S.D. Ala. 1997), citing Schoenbaum, Admiralty and Maritime Law 798 (1987) . A finder must show by clear and convincing evidence that the owner voluntarily intended to divest himself of title. Id. Admiralty law favors the law of salvage over the law of finds because salvage law's aims, assumptions and rules are more consonant with the needs of marine activity. See Benedict on Admiralty, 158, 11-16, (citations omitted).

Salvage law specifies the circumstances under which a party may be said to have acquired not title but the right to take possession of property (e.g., vessels, equipment and cargo) for the purpose of saving it from destruction, damage or loss, and to retain it until proper compensation has been paid. Id. Salvage law assumes that the property being salved is owned by another and thus assumes that it has not been abandoned. Id. Even sunken cargo and vessels are in general deemed "abandoned" in admiralty only in the sense that the owner has lost the power to prevent salvage; a finding that title to such property has been abandoned requires strong proof, such as the owner's express declaration abandoning title. Id.

A.K. Steel's claim for salvage lien, to the extent that it had one, is time-barred. It is well established that a claim to enforce salvage rights must be brought within two years after the services of salvage are completed. See 46 U.S.C. 730; cf. Schoenbaum, §16-5. In this case American Eagle completed salvage of the steel slabs at issue on April 26,

1994. Plaintiffs added defendants American Eagle and A.K. Steel on August 15, 1995, alleging title to the salvaged steel. In its answer, American Eagle asserted that it lawfully salvaged the steel as a defense to liability but did not file a salvage lien. In its answer, A.K. Steel did not assert its salvage rights, but filed a cross claim seeking to quiet title to the steel. A.K. Steel amended its answer and counterclaim seeking a salvage award on December 24, 1997, more than two years after completion of the salvage.

A.K. Steel contends that its counterclaim for salvage relates back to its original action to quiet title to the salvaged steel pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, which provides that an amended pleading shall relate back. Federal R. Civ. Proc. 15(c). The fact that the Court permitted A.K. Steel to assert its claim for salvage in December 1997 does not bear on whether the claim is time-barred or relates back under Rule 15(c). Under Rule 15(c) an amendment to a complaint will relate back to the date of the original complaint if the claim asserted in the amended pleadings arises "out of the same conduct, transaction or occurrence set forth or attempted to he set forth in the original pleadings." Rule 15(c)(2).

Plaintiffs claimed against A.K. Steel to quiet title to the salvaged cargo. In bringing its counterclaim, A.K. Steel is not merely correcting a technicality or amplifying facts previously alleged. See FDIC v. Conner, 20 F.3d 1376, 1384, (5th Cir. 1994). Rather, A.K. Steel added an affirmative counterclaim for salvage lien and bonus. See Basic Boats, Inc. v. United States, 311 F.Supp. 597, 597 (E.D. Va. 1970) (distinguishing addition of counterclaim from Rule 15(c)

amendments). This Court concludes that A.K. Steel's affirmative claim for salvage lien filed on December 24, 1997, is time-barred.

A.K. Steel and American Eagle are entitled to assert a salvage lien as an affirmative defense and a basis for recoupment. See id. ("[T]here is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation.") This conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs.

The Court concludes that plaintiffs have title to the salvaged steel. The Court found that Duferco abandoned the steel to plaintiffs, who rejected the abandonment initially, but subsequently obtained title to the steel slabs on February 1, 1995 pursuant to the Assignment and Subrogation Receipt. Though plaintiffs did not assert title to the sunken cargo, they had title to it and there is no "clear and convincing" proof presented at trial that plaintiffs expressly abandoned title to the sunken cargo. Thus, the Court applies the law of salvage rather than the law of finds. The conclusion that plaintiffs possessed title to the cargo, whether sunken or salvaged, results in the corollary conclusion that A.K. Steel does not possess title to the salvaged steel which it purchased from American Eagle.

The Court concludes that A.K. Steel has no claim or defense pursuant the "voidable title doctrine" against American Eagle. The Court found, based on the testimony of

Doug Adams and Lynn Riley, that American Eagle did not warrant title to A.K. Steel. The purchase order of March 8, 1995, executed by A.K. Steel and American Eagle speaks for itself. The purchase order indicates (1) that American Eagle sold its "possession in salvage and title rights, if any"; and (2) that American Eagle warrants that the "slabs have been abandoned for salvage by the owners/underwriters." American Eagle attached two documents to the purchase order in support of "ownership and abandonment of the slabs"; these two documents were the salvage contract taken out by ICA on behalf of Duferco and the July 6, 1994 letter from ICA cancelling the contract. A.K. Steel Exhibit 14.

Pursuant to the purchase order, American Eagle sold its possession and salvage interests to A.K. Steel and only warranted documentation of abandonment by owners to underwriters. American Eagle neither possessed nor transferred nor warranted title to the salvaged slabs to A.K. Steel. Accordingly, the voidable title doctrine contained in the Uniform Commercial Code and Ohio law has no application here as this doctrine presupposes transfer of title by the seller. See Ohio Rev. Code §1302.44(A). §1302.44(A) provides:

"A purchaser of goods acquires all title which his transfer error had or had power to transfer ... A person with voidable title has power to transfer a good title to a good-faith purchaser for value." Id. Since American Eagle did not purport to transfer title of any kind, the Court finds the above provision inapplicable to the facts of this case.

American Eagle possessed a valid salvage lien. Plaintiffs argue that the law of salvage applies here. Plaintiffs

do not challenge any elements of American Eagle's salvage claim. The elements necessary to establish a salvage claim are: (1) a maritime peril to the property; (2) voluntary service by the salvor; and (3) the salvage effort must be successful in whole or in part. See Thomas J. Schoenbaum, Admiralty and Maritime Law, §16-7, at 324 (1994) ("Schoenbaum"); Falgout Bros., 966 F. Supp at 1145, citing, e.g., The Sabine, 101 U.S. 384 (1879).

Rather, plaintiffs contend that neither American Eagle nor A.K. Steel acted "in good faith. They had notice of plaintiffs' ownership. Their bad faith forfeits any award they may have been entitled to." Specifically, plaintiffs contend: (1) that American Eagle salvaged the steel in had faith because it should have returned the property to plaintiffs; and (2) that A.K. Steel purchased the steel in bad faith from American Eagle. Though a salvor acting in bad faith or without consent of the owner is not entitled to a salvage award, the Court found no bad faith on the part of American Eagle in salvaging the steel. See Jackson Marine Corporation v. Blue Fox, 845 F.2d 1307, 1309; Schoenbaum, §16-4 at 329. Finally, plaintiffs did not preserve a claim for negligent salvage in the Pretrial Order and there was no proof offered by plaintiffs in support of such claim for negligence. See Pretrial Order, p. 47.

The Court's findings on the salvage, supported by the testimony of Doug Adams and J. Kenneth Edgar, indicate that the successful salvage effort was undertaken in good faith. Likewise, there was no proof of bad faith on the part of A.K. Steel or American Eagle with respect to salvage, sale and purchase of the steel slabs.

American Eagle and A.K. Steel are entitled to recoupment of a salvage award for salvage of the steel slabs from the Mississippi River. The traditional criteria for an award are as follows:

(1) The time and labor expended by the salvor in rendering the salvage service;

(2) The promptitude, skill and energy displayed in rendering the service and saving the property;

(3) The value of the property risked or employed by the salvor and the degree of danger to which the property was exposed;

(4) The value of the property saved; and

(5) The degree of danger from which lives and property are rescued.

Schoenbaum, §16-5; cf. Falgout Bros., 966 F.2d at 1145. The salvage award may not exceed the value of the property saved. Schoenbaum, supra. The Court determines the value of the property saved according to appropriate recognized methods such as expert testimony. Id. Two aims underlie the provision of salvage awards: (1) just recompense for exemplary conduct; and (2) fostering economic efficiency.

The Court applies the factors to determine the salvage award in this case. As a starting point, American Eagle sold the salvaged steel to A.K. Steel for approximately $525,000.

The Court found that American Eagle sold its salvage rights to A.K. Steel; American Eagle did not subsequently perfect a salvage lien against plaintiffs. It is uncontested that American Eagle incurred expenses of $450,198.91 in salvaging the steel and earned a profit of $75,000. The Court found, based on the testimony of Adams and Edgar, that the salvage effort was risky, difficult and time-consuming, given the traffic at the location of the sunken barges, the depth of the cargo at the time of the salvage and prevailing conditions, including lack of visibility, sand coverage and decompression by salvage divers.

The salvage was successfully performed over a period of several months (from February to April 1995) and 30 slabs of sunken steel were not salvaged. In performing the salvage, American Eagle lost a tugboat. Edgar testified that cargo continues to sink. One of the reasons American Eagle salvaged the steel in early 1995 was that American Eagle was performing other salvage jobs nearby during that period. Had American Eagle not been mobilized on site to undertake salvage, i.e., had American Eagle mobilized its resources and equipment expressly for salvage of this cargo, its expenses would have been slightly higher. The Court, therefore, finds that American Eagle's salvage expenses were reasonable.

The Court found that the value of the salvaged cargo was approximately $716,400. In view of the value of the steel, the Court finds that a salvage award of $525,424.32 is an appropriate award in this case. The Court's award coincides with the price tag that American Eagle sought to recover for its services when it sold the steel and its salvage rights

to A.K. Steel, which fact confirms that it is reasonable remuneration given the conditions, expenses, risks and property value involved.

The Court concludes that plaintiffs have title to the salvaged steel. The Court further concludes that American Eagle and A.K. Steel are liable for negligent conversion of the steel because they exercised dominion or control over the steel by sale, purchase and consumption of the steel, which seriously and totally interfered with plaintiffs' right to control the steel. American Eagle kept one slab. It was never converted and is not included in the damage award. Thus, A.K. Steel and American Eagle are in solido liable to plaintiffs and UMS for the value of the 127 slabs of steel, but may recoup the salvage award against plaintiffs.

The Court finds for the reasons stated previously that the UMS policy provides and UMS is entitled to subrogate against A.K. Steel and American Eagle. An insurer has an equitable right of subrogation as a matter of law upon making payment for a cargo loss and retains its subrogation rights against parties responsible for same even after it litigates the issue of coverage. Ingersoll Mill. Mach. Co. v. M/V Bodena 829 F.2d 293, 308-309 (2nd Cir. 1987). Accordingly, plaintiffs and UMS are each entitled to claim their pro rata share of the damages levied against A.K. Steel and American Eagle. Plaintiffs are not entitled to recover attorneys fees as they have supplied no statutory or contractual support for same.

Finally, the Court concludes that there is coverage for negligent conversion under the general liability policy of

insurance issued to American Eagle by Britamco Underwriters, Inc. Britamco Underwriters, Inc. ("Britamco") issued a comprehensive general liability policy, No. KA0315, ("Britamco policy") to American Eagle effective during the period when American Eagle salvaged and sold the steel to A.K. Steel. Britamco maintains a position of no coverage for any liability on the part of its insured should American Eagle be liable, "intentionally depriving a third party of valid property rights." This policy is construed under Louisiana law. The Court concludes that the policy is unambiguous and can be enforced by its terms. Reynolds v. Select Properties, Ltd., 634 So.2d 1180, 1183 (La. 1994).

Britamco maintains that there is no coverage under the policy for the negligent conversion because the policy excluded "property damage expected or intended from the standpoint of the insured." Britamco's reliance on Red Ball Leasing v. Hartford Accident and Indemnity, 915 F.2d 306 (7th Cir. 1990) is misplaced. In that case the claimant "intended to deprive" another of its property and thus fit neatly into the exclusion of coverage for property damage that was "expected or intended." Here there was no evidence that American Eagle intended to deprive plaintiffs of their property.

American Eagle did not know that plaintiffs owned the steel. They took pains to avoid warranty of title and sold the steel, as well as their salvage rights, so as to avoid any future involvement in a title dispute. As stated earlier, American Eagle had possession of the letter stating that Duferco had abandoned any interest in the steel. Any conduct by American Eagle was negligent and is not included under the

Britamco policy. Therefore, the Court finds coverage under the Britamco policy.

The Court determined the value of the salvaged steel at the time of salvage was $716,400. The Court concluded that the salvage award is $525,424.32. Accordingly, A.K. Steel and American Eagle are in solido liable for $190,975.68; to plaintiffs in the amount of $38,195.13 and to UMS in the amount of $152,780.55. UMS is liable to plaintiffs in the amount of $789,081.93. All awards with interest and costs to be set forward in the judgment.

I will give you tomorrow a copy of this because we have made changes as we went along. We thought the parties in this case, even though they may well be disappointed, considering the length of time and the amount of money spent thus far, had a right to an expeditious decision so they can do with it what they might. With that, we will render judgment and judgment will be signed tomorrow. You can pick up an unsigned copy of this draft with the few little corrections that we have made.

MR. CARROLL: Your Honor, may I say for the record that on behalf of American Eagle we thank you for your attention. We thank you for the time you put into this case, particularly in rendering a judgment as quickly as you can.

MR. MINICLIER: And your patience during this long and protracted litigation, Your Honor.

THE COURT: At this time court is adjourned.

THE DEPUTY CLERK: All rise.

(WHEREUPON, the Court was in recess.

* * * * *

REPORTER'S CERTIFICATE

I, Toni Doyle Tusa, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Toni Doyle Tusa
Toni Doyle Tusa, CCR
Official Court Reporter

July 28, 1998

Toni Doyle Tusa, CCR
501 Magazine Street, Room 406
New Orleans, Louisiana 70130

Courtenay, Forstall, Hunter & Fontana
730 Camp Street
New Orleans, Louisiana 70130

RE: USDC, EDL, 94-CV-1954-K
Adams, et al v. Unione Mediterranea De Sicurta, et al

For furnishing the original transcript of an excerpt from the proceedings of June 18, 1998, before the Honorable Stanwood R. Duval, Jr., United States District Judge presiding.

45 pages @ $3.00/page. $135.00

I CERTIFY THAT THE TRANSCRIPT FORMAT AND FEE COMPLY WITH THAT AS SET FORTH BY THE COURT AND THE U.S. JUDICIAL CONFERENCE.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-30875

U.S. COURT OF APPEALS
FILED
AUG 14 2000

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE CO, LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD

Plaintiffs - Appellees - Appellants - Cross Appellants - Cross Appellees

VERSUS

UNIONE MEDITERRANEA DI SICURTA; ET AL
Defendants

AMERICAN EAGLE MARINE, INC
Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

VERSUS

AK STEEL CORPORATION, formerly know as,
Armco Steel Company, LP
Defendant - Appellee - Cross Appellant

VERSUS

UMS GENERALI MARINE S.P.A., formerly known as Union Mediterranea Di Sicurta'

Defendant - Appellant - Cross Appellee

VERSUS

BRITAMCO UNDERWRITERS, INC
Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

Appeals from the United States District Court
For the Eastern District of Louisiana

Before JONES, DUHÉ, and WIENER, Circuit Judges.

DUHÉ, Circuit Judge:

This appeal involves two causes of action arising out of the sinking of a cargo of 158 steel slabs in the Mississippi River. The first cause of action is a dispute between two insurers of the cargo, Steve Henry Adams, et. al. ("the Plaintiffs") and U.M.S. Generali Marine S.P.A. ("UMS"), over whether the non-paying coinsurer (UMS) should be required to contribute to the payment of loss. The second action is a claim by the Plaintiffs for conversion of the cargo against a voluntary salvor, American Eagle Marine, Inc. ("American Eagle") , and the subsequent purchaser of the salvaged cargo, A.K. Steel Corp. ("A.K. Steel").

Regarding the dispute between the insurers, we conclude that UMS did not waive its personal jurisdiction defense, and we reverse and remand for the district court to determine jurisdiction. We do not decide the other issues UMS and the Plaintiffs raise on appeal against each other. As to the conversion dispute, we affirm on all grounds except one. We reverse and vacate the district court's determination that American Eagle's general liability insurance policy with Britamco Underwriters, Inc. ("Britamco") provided coverage for American Eagle's negligent conversion. We do not decide whether UMS may subrogate against American Eagle and A.K. Steel.

BACKGROUND

I. Factual Background

While en route from New Orleans to Cincinnati,

Canal Barge Company ("Canal Barge") barges CBX 207 and 214 sank in the Mississippi River. This case involves a dispute over the 158 slabs of steel cargo carried to the riverbed aboard those two barges. A.K. Steel of Middletown, Ohio, had originally agreed to purchase the steel slabs from Duferco, S.A ("Duferco"), a Swiss Company.

The Plaintiffs and UMS concurrently insured the cargo under open marine cargo policies. Duferco had an open cargo policy with UMS, an Italian insurance company, which was written and issued in Italy and delivered to Duferco in Switzerland. Canal Barge had an open cargo/shippers' interest insurance policy with the Plaintiffs, on which Duferco was named as an additional insured.

After the accident, Duferco made a claim with UMS. Duferco, through its agent, the Italian Claims Agency ("ICA"), awarded a salvage contract to American Eagle to raise the cargo. The contract provided that it could be canceled with notice and that American Eagle did not have to perform salvage until the river gauge at Vicksburg fell below 20 feet, the depth at which salvage could be prudently performed. UMS advanced to Duferco $191,000 in sue-and-labor costs for the salvage effort. In March 1994, UMS denied the claim primarily because Duferco failed to warrant proper loading of the cargo. In the meantime, A.K. Steel (the original intended purchaser) confirmed that it did not own the cargo and assigned any and all of its rights to Duferco.

The salvage contract remained in effect until July 6, 1994, when ICA wrote American Eagle advising that

Duferco was canceling the contract. In the letter, an ICA representative wrote that the cargo "had been abandoned." The parties greatly dispute the meaning of this letter and the circumstances surrounding it. From July 6, 1994 until it mobilized its voluntary effort near the end of January 1995, American Eagle did not salvage the steel, although the river gauges suggested that the months of September, October and November of 1994, presented optimum times for salvage because of the low water depths. On February 18, 1995, with the river gauge just below the minimum depth for prudent operations, American Eagle voluntarily undertook salvage of the steel.

American Eagle did not negotiate with potential buyers for the steel before commencing the salvage operation. While it made some attempt to discover the chemical composition of the steel, it abandoned those efforts, thereby lowering the potential market value for the steel. American Eagle first contacted A.K. Steel on January 7, 1995. A.K. Steel offered to purchase what it described as the "Duferco Steel, that had sunk in the Mississippi." American Eagle was unaware that A.K. Steel was the original intended purchaser of the steel. A.K. Steel did not advise the Plaintiffs or other interested parties of its negotiations with American Eagle to purchase the steel.

In negotiations, American Eagle refused to warrant title to the steel as insisted by A.K. Steel. During the salvage operation, American Eagle also refused to sell the steel to another buyer because this purchaser demanded that American Eagle warrant title. Instead, it would only warrant abandonment for salvage, a demand to which A.K. Steel

eventually acceded. On March 8, 1995, American Eagle sold all its rights in the cargo retrieved to A.K. Steel. In the purchase agreement, American Eagle sold to A.K. Steel its "rights, and possession in salvage and title rights, if any."

Salvage operations commenced on February 21, 1995, and continued through April 26, 1995. American Eagle successfully salvaged 127 steel slabs, relinquishing them to A.K. Steel as they were placed aboard barges in the river. Pursuant to their contract, A.K. Steel paid American Eagle $525,424.32. The Plaintiffs did not assert an ownership interest in the steel until after the salvage operation was completed.

The Plaintiffs were made aware of the salvage operation in April 1995 by Canal Barge's counsel, who advised Plaintiffs, counsel that Douglas Adams of American Eagle had inquired about salvaging the cargo. When the Plaintiffs advised American Eagle and A.K. Steel that the cargo was theirs and that the salvage should cease, they both refused. American Eagle and A.K. Steel initially argued that they owned the steel. Later American Eagle and A.K. Steel asserted defenses based on the laws of salvage.

II. Procedural History

The Plaintiffs brought this case originally as an action for declaratory relief to ascertain the proper party to pay the constructive total loss of cargo under the insurance policy they issued to Canal Barge. They also sought to determined whether UMS, which also issued Duferco a

similar policy insuring the same cargo, was obligated to contribute to the payment. Plaintiffs named as defendants Ilva, the manufacturer of the steel; Duferco; Canal Barge; UMS; and Duferco Steel, Inc., an American sister company to Duferco. The court voluntarily dismissed Ilva, Duferco, Duferco Steel, Inc., Canal Barge and A. K. Steel from this initial action at various times. The Plaintiffs later made A.K. Steel a co-defendant in the action for conversion of the steel.

In the initial declaratory relief action, the district court held that Duferco was entitled to recover its loss from either Plaintiffs or UMS. Since Duferco made demands on the Plaintiffs first, the Plaintiffs were obliged to pay Duferco before seeking contribution from UMS. Pursuant to this ruling, the Plaintiffs paid Duferco $986,352.41 in exchange for an assignment of Duferco's rights, if any, against UMS. Plaintiffs refused Duferco's claim for payment of approximately $191,000 in sue and labor expenses (specifically, investigation expenses, survey costs, and attorney's fees) advanced by UMS during the preliminary loss investigation. The district court voluntarily dismissed A.K. Steel, which had relinquished any claim it may have had, from the suit prior to payment of the Duferco claim.

The Plaintiffs then discovered the salvage effort and demanded that American Eagle and A.K. Steel return the cargo or pay its value. When American Eagle and A.K. Steel refused, the Plaintiffs filed an amended declaratory judgment action, which asserted a claim to recover the value of the steel from American Eagle and A.K. Steel. UMS then filed a cross-claim against A.K. Steel and American Eagle.

At trial on the amended declaratory action, it was determined that although UMS had initially agreed to pay Duferco's claim, UMS denied coverage after learning Canal Barge had additional coverage. The district court rejected every coverage defense raised by UMS.[1] In rejecting these defenses, the district court found that UMS was obliged under its policy with Duferco to contribute to the loss in proportion to the amount its coverage bore to the total amount of insurance (80 percent of the loss) . The district court awarded the Plaintiffs $789,081.93 against UMS or 80 percent of $986,352.41.

In the conversion action, the district court found that American Eagle and A.K. Steel had, albeit in good faith, negligently converted the steel.[2] The court held that the Plaintiffs had not abandoned the cargo. The court awarded $190,975.68 for the conversion, which it divided on an eighty-twenty basis between UMS ($152,780.55) and Plaintiffs ($38,195.13). The district court entered judgment against American Eagle and A. K. Steel in favor of UMS and the Plaintiffs for these amounts. Finally, the court held that American Eagle's liability for negligent conversion was covered by its general liability insurance policy

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[1] The district court earlier had granted the Plaintiffs' motion to compel substitution of real party in interest. This motion requested the district court to make UMS an involuntary Plaintiff in Duferco's cross-claim against Canal Barge.

[2] The district court and the parties treat both American Eagle and A.K. Steel as salvors. For this reason, we likewise do so in certain portions of our opinion.

with Britamco.[3]

In calculating the judgment, the district court determined that the cargo's value, after applying a 20 percent discount based on the unavailability of the steel's chemistries to Plaintiffs, was $716,400.[4] The court then offset the value of the sunken steel by $525,424.32, American Eagle's salvage expenses. The district court held that American Eagle's and A.K. Steel's right to assert a salvage claim against the Plaintiffs had lapsed with the passage of the two-year prescriptive period, but the right could nonetheless be asserted as an affirmative defense. The $190,975.68 is then the difference between the discounted value of the cargo and the salvage expense.

No party is happy with the district court rulings. On appeal, UMS has dropped all coverage defenses. UMS appeals the district court rulings concerning personal jurisdiction over it, venue, and the allocation of the loss between insurers. The Plaintiffs contend that UMS should be barred from receiving any money judgment from A.K. Steel and American Eagle until it pays them its pro- rata share of the constructive loss. Plaintiffs also argue that the district court abused its discretion in not allowing them to recover attorney's fees and expenses from UMS.

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[3] During the course of this litigation, American Eagle filed for bankruptcy. The court then ordered an automatic stay. The court lifted the stay and substituted Britamco as the real party in interest.

[4] The district court reached this amount by reducing the per net ton of the steel from $300 to $240 and then presumably multiplying that figure by the tonnage of the salvaged steel.

Regarding the conversion litigation, American Eagle and A.K. Steel appeal the district court's finding of negligent conversion, arguing that the cargo was abandoned. American Eagle also appeals the district court's ruling on negligent conversion, arguing that it only transferred its possessory interest and salvage claim to A.K. Steel. In addition, A.K. Steel appeals the district court's holdings that it was not protected by the voidable title doctrine, that UMS could subrogate against it, and the court's exercise of subject matter jurisdiction. Plaintiffs cross-appeal the district court's ruling that American Eagle and A.K. Steel could assert the right to a salvage claim as an affirmative defense, its ruling that they acted in good faith, and its calculating the steel's value and the salvage award. Finally, American Eagle's insurer, Britamco, alleges that the district court erred in concluding that its-policy covered American Eagle's negligent conversion.

DISCUSSION

I. Personal Jurisdiction over UMS

We review de novo the district court's determination that its exercise of personal jurisdiction over a non-resident defendant is proper when the relevant facts are not in dispute. Wilson v. Belin, 20 F.3d 644, 647-48 (5th Cir. 1994). When a nonresident defendant timely questions a federal district court's jurisdiction over it, the plaintiff bears the burden of establishing jurisdiction. Id. at 648; Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826, 831 (5th Cir. 1986). In determining personal jurisdiction, a court is not restricted to a review of the plaintiff's pleadings. It may

resolve a jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any recognized form of discovery. Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 (5th Cir. 1996).

In admiralty cases, a federal court may exercise personal jurisdiction over a foreign defendant, such as UMS, when (1) Louisiana could have acquired personal jurisdiction over the defendant on the same cause of action; and (2) the exercise of jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 786 (5th Cir. 1990). In this case, these two inquiries merge into one because Louisiana's long-arm statute permits jurisdiction coterminous with the scope of the Due Process Clause. Id. See La. Rev. Stat. Ann. § 13:3201 (West 1991).

Additionally, a defendant may waive its personal jurisdiction defense, thereby consenting to jurisdiction. See Travelers Indem. Co., 798 F.2d at 834. ("Clearly parties can waive lack of personal jurisdiction."). Usually a party waives personal jurisdiction by failing to raise the issue when filing a responsive pleading or making a general appearance. Fed R. Civ. P. 12 (h) . In rarer circumstances, a defendant may waive personal jurisdiction if it authorized another to appear or act on its behalf in court. Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1121 (6th Cir. 1994) (citing Federal Deposit Ins. Corp. v. Oaklawn Apts. 959 F.2d 170, 175 (10th Cir. 1992)).

The district court concluded that UMS waived

personal jurisdiction because it authorized Duferco to appear on its behalf.[5] The court first determined that the legal representations of UMS and Duferco were intimately intertwined. The court examined Statements for Professional Services Rendered submitted by various law firms involved in this litigation. The court found that those documents indicated that at the time Duferco filed its answer to the Plaintiffs' complaint, the same attorneys represented UMS and Duferco. In addition, UMS paid Dufercols legal bills during 1994 and 1995; and a law firm representing Duferco had represented UMS on other occasions.

The Court also concluded that not only was the legal representation intertwined, but the claims were as well:

> UMS' attempt to shield itself from the jurisdiction of this court by relying on Dufercols ostensible obligation to reimburse them is disingenuous, at best. Indeed, UMS continually argues that Duferco must reimburse them for the fees expended during the salvage attempt. However, Duferco has paid UMS nothing despite that the loss occurred over two years ago. Nor has the Court been given any proof that UMS has instituted suit against Duferco in Italy for this money.

The court found that UMS attempted to insulate itself from the court's jurisdiction by hiding behind Duferco. "Duferco is truly acting for UMS. Thus, this Court finds that UMS has

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[5] The court denied UMS' motion to dismiss for lack of jurisdiction and later denied UMS' motion to reconsider and order seeking certification pursuant to 28 U.S.C. § 1292(b). The court denied UMS, motion to reconsider for the same reasons stated in its earlier order.

waived its personal jurisdiction defense through the actions of Duferco." Citing Reynolds, 23 F.3d at 1121. Because of this finding, it was unnecessary for the court to consider whether it had specific or general personal jurisdiction over UMS.

On appeal, UMS raises some legitimate questions regarding the district court's findings regarding the relationship between UMS and Duferco. As to the court's determination that UMS had not sought reimbursement for the sue-and-labor costs from Duferco for nearly two years, UMS contends that such action was not necessary because UMS already had a less formal but equally effective means to enforce Dufercols obligation to pay. A Duferco director testified in a deposition that on July 3, 1995 UMS entered a debit of $191,000 on Dufercols open account.[6] (R. at 3689-3691) . This amount was subtracted from a total premium refund of $574,342, which was paid to Duferco when the accounting for the 1993-1994 policy year was completed. (See UMS Bench Book of Exhibits 16).

UMS also claims that the District Court misapplied Reynolds in holding that UMS authorized Duferco's actions. In Reynolds, the Sixth Circuit reversed the lower court's holding that the International Amateur Athletic Federation ("IAAF") had waived its jurisdictional defenses by reason of a Federation member's intervention in a lawsuit filed against the IAAF by a disgruntled athlete. The Sixth Circuit

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[6] The Plaintiffs contend that this deposition only reinforces the district court conclusion. The director testified that he did not regard the expenses to be owed by Duferco. Instead, he expected full recovery of its losses and expenses from UMS.

determined that the member was carrying out a statutory duty when it intervened, and noted that there was no evidence indicating the IAAF authorized the member to do so. Reynolds, 23 F.3d at 1121. To some extent, this case is similar to Reynolds. Duferco had an obligation under Italian law to reimburse the expenses to UMS. Italian Civil Code, Article 2041 (Mario Betramo, et. al., trans.) (1991) ("General cause of action for unjust enrichment. A person who has enriched himself without cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss.")[7]

UMS makes a strong showing that it has been reimbursed, but we are still left with undisputed evidence that the legal representations of UMS and Duferco were intimately intertwined. UMS contends that even this evidence does not amount to consent to personal jurisdiction.

Cases dealing with this factual scenario are few and far between. Travelers Indem. Co., 798 F.2d at 832-35, involved a dispute over defendant insurer London Club's indemnity obligations arising from a maritime collision. In the suit, counsel selected by London Club had consented, on behalf of the shipowner, to transfer the case to Louisiana. The Plaintiffs argued that this consent amounted to a waiver of London Club's personal jurisdiction defenses in federal court in Louisiana. We held that the consent to transfer did not result in London Club's waiver of its personal jurisdiction defenses. Id.

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[7] Plaintiffs contend that this argument rings hollow in light of UMS' failure for nearly two years to attempt to recover the expenses from Duferco in an Italian forum.

One federal district court has rejected the contention that a foreign defendant waives jurisdiction when it has a controlling interest in ongoing litigation in the United States. Complaint of Kreta Shipping, S.A., No. 96 Civ. 1137, 1998 WL 173167 (S.D.N.Y. Jan. 29, 1998), arose out of the abandonment of the M/V AMPHION, which resulted in damage to a cargo of steel laden on board. Kreta, the owner of the vessel, commenced a limitation action in federal court seeking exoneration from or limitation of liability with respect to losses connected with the AMPHION's voyage.

Kreta had hired Astron Maritime Company to provide management services for the vessel in accordance with a standard managing and agency agreement, which was signed and negotiated in Greece. Claimants in the limitation proceeding filed actions in federal court against Astron, which sought to dismiss these claims for lack of personal jurisdiction. The claimants did not contend that any of the facts presented to the district court subjected Astron to personal jurisdiction. Rather, they took the position that jurisdiction came from Astron's conduct in the Kreta Shipping litigation. They specifically alleged that Astron, rather than Kreta, made the decision to file the limitation action and had "power over litigation conferred by the ship management contract." Id. at *3.

The district court rejected this theory and concluded that Astron did not consent to personal jurisdiction through its involvement in the Kreta Shipping litigation.

> The fact that Astron may be the party ultimately liable and that Astron may have directed the decision-making

> behind this lawsuit does not result in Astron having consented to the Court's jurisdiction. These facts make Astron no different than the typical maritime (or other) insurer - an insurer will often be the party ultimately financially liable, may provide for the insured's legal representation and legal strategy, and often effectively controls the conduct of the lawsuit. Insurers do not, however, consent to personal jurisdiction through such activities (absent state "direct action" or similar insurance legislation).[8]

The district court's reasoning in Kreta shipping is compelling; in particular the court's recognition that insurers often must take an active role in an insured's legal problems.[9] UMS has continually argued that it is accepted industry custom world-wide for an insurer to retain the same attorneys to act for itself and its insured when investigating loss. While UMS, actions may be somewhat suspect, the evidence does not support a finding that UMS has relied on these tactics to insulate itself from jurisdiction of the district court. The evidence equally supports a finding that UMS acted like any other insurer would when its insured faces legal liability. In addition, our standard of review places the

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[8] Id. at *7 (internal citations omitted). The direct action statute in Louisiana is not a legislative assertion of jurisdiction over insurance companies. McKeithen v. M/T FROSTA, 435 F. Supp. 584, 586 n.6 (E.D. La. 1977).

[9] The Plaintiffs argue that the factual circumstances in Kreta Shipping are critically different from those in this case because the shipping agent in Kreta Shipping was not attempting to assert a cause of action for funds owed to the agent. Whereas, UMS was asserting its claim disguised as Duferco. The Plaintiffs, however, do not dispute the central holding of Kreta Shipping. Moreover, based on the analysis above, it is impossible to discern what motives, if any, UMS had as to the funds in question.

burden on the plaintiff, and not the defendant, to support finding personal jurisdiction. See also C. Wright & A. Miller, Federal Practice and Procedure § 3522 at 60 (1984) ("It is a principle-of first importance that the federal courts are courts of limited jurisdiction.").

For these reasons, we conclude that UMS did not waive its personal jurisdiction defenses and we reverse the district court. Because of its decision on waiver, the district court did not decide whether it had specific or general jurisdiction over UMS.[10] Since the parties dispute whether the district court has jurisdiction over UMS, we remand the case for a further determination of jurisdiction. Because jurisdiction over UMS is unresolved, we do not address the other issues the Plaintiffs and UMS raise on appeal: The Plaintiffs claim attempting to block UMS from receiving its money judgment and their claim seeking attorney's fees and expenses from UMS; and UMS claims of improper venue and improper allocation of loss between insurers. We also do not address whether UMS may subrogate against American Eagle and A.K. Steel.

II. Salvage and Title Dispute

A. Abandonment of the Cargo

We review findings of fact for clear error and legal conclusions de novo. Ivy v. Jones, 192 F.3d 514, 516 (5th

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[10] The parties submitted motions to the court addressing the personal jurisdiction/minimal contacts inquiry and the district court conducted a hearing, but ruled only on the waiver issue.

Cir. 1999). Under the clearly erroneous standard, we look first to whether there is substantial evidence supporting the findings. We will not set aside the district court's factual findings when they are supported by substantial evidence, unless, after a review of the record as a whole, we are left with the unyielding belief that a mistake has been made. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

The district court held that the Plaintiffs had title to the salvaged steel. The court determined that the law of salvage applied to this case, rather than the law of finds. Therefore, A.K. Steel did not possess title to the salvaged steel, which it acquired from American Eagle. On appeal, American Eagle and A.K. Steel contend that title to the cargo was abandoned pursuant to the law of finds, therefore, American Eagle and subsequently A.K. Steel should be considered the rightful titleholders.

We review whether the sunken cargo comes within the law of salvage or the law of finds.[11] One commentator has noted that "[t]here appears to be no clear line of

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[11] A.K. Steel argues that the trial court incorrectly determined that it had admiralty jurisdiction over the title issue and state law should apply because the steel slabs were abandoned and embedded in the river bed. It contends that this case does not come within the jurisdiction of federal courts under the Abandoned Shipwrecks Act. In California v. Deep Sea Research Inc., 118 S.Ct. 1464, 1473 (1998), the Supreme Court held that the Eleventh Amendment does not bar federal jurisdiction to adjudicate the status of a wreck under the Abandoned Shipwrecks Act, 43 U.S.C. §§2101-2106. In addition, the Abandoned Shipwrecks Act does not govern this case. As a rule, claims arising out of salvage operations are within the admiralty jurisdiction of federal courts. Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir. 1981).

demarcation between property that is 'salvaged' and 'finds.'" Frank L. Maraist, Admiralty in a Nut Shell 130 (West 3d ed. 1996). Generally speaking, "[m]arine salvage occurs when marine property is successfully saved by a volunteer from marine peril. By performing a voluntary and successful act, the salvor obtains a maritime lien on the salved property, which he can enforce in rem in an admiralty court." Martin J. Norris, Benedict on Admiralty § 802[A] at 8-4 (1998).

The owner of the distressed goods on navigable waters does not lose title even though the property may become the subject of salvage services. Id. § 150 at 11-1.[12] "The salvor obtains a right of possession; he does not acquire ownership or title to the salved property." Id. § 150 at 11-1 to 11-2. The maritime lien allows the salvor to secure compensation for his voluntary services. "All that the salvor can do is to enforce his lien by making his claim to an award. He thus has a lien and he has the right of possession. He also has the duty of properly caring for the property while it is in his possession." Id. at 11-2.

A find, on the other hand, differs from salvage in that the property has either been abandoned (as further defined below) or never owned by any person. The property belongs to the finder.

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12 "When articles are lost at sea the title of the owner in them remains, even if they are found floating on the surface or after being cast upon the shore. Should a vessel be abandoned without hope of recovery or return, the right of property still remains in her owner." Benedict on Admiralty 150 at 11-1

Benedict on Admiralty notes:

> The common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner.
> . . . . Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of maritime activity and because salvage law encourages less competitive and secretive forms of conduct than finds law . . . . [A] finding that title to such property has been lost requires strong proof, *such as the owner's express declaration abandoning title.*" Id. § 158 at 11-16 (quoting Hener v United States, 525 F. Supp. 350 (S. D. N. Y. 1981) (emphasis added)).

Several courts favor salvage instead of finds, and have applied the law of finds only when supported by strong evidence. The Fifth Circuit has noted that even when a vessel is abandoned the original owner is not divested of title "except in extraordinary cases . . . where the property has been lost or abandoned for a very long period." Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981).

The more important question, however, is what must an owner do to affirmatively release title to the.property - forever abandoning it under the law of finds. As the Fourth Circuit has noted there are only a handful of cases applying the law of finds. These cases fit into two categories. "First, there are cases where owners have expressly and publically abandoned their property. In the second type of case, items

are recovered from ancient shipwrecks and no owner appears in court to claim them." Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F. 2d 450, 461 (4th Cir. 1992) (internal citations omitted) In the first context, a party may show abandonment only by a clear and unmistakable affirmative act indicating a purpose to repudiate ownership. Id. A federal district court has said that abandonment under the law of finds must be proven by "*clear and convincing evidence*," such as the owner's express declaration abandoning title. Falgout Brothers, Inc. v. S/V Pangaea, 966 F. Supp. 1143, 1145 (S.D. Ala. 1997) (citing Columbus-America Discovery Group, 974 F.2d at 461) (emphasis added).

Therefore, we must apply the law of salvage unless American Eagle and A.K. Steel demonstrate through clear and convincing evidence that the owner of the steel, Duferco or later the Plaintiffs, made an. express declaration abandoning title. We now review the pertinent facts.

On July 6, 1994, ICA Representative Victor Bruzzone (Dufercols agent) wrote a letter to American Eagle stating, "[w]ith reference to the aforementioned salvage contract and in conformity with paragraph 6, we are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." Duferco then sent a letter on July 28, 1994 to Canal Barge saying:

> We hereby advise you and your cargo underwriters that the 'steel slabs' in question have been abandoned by us. It has been our understanding for some time that you and representatives of your cargo underwriters were aware that the salvage of the cargo in question was impossible

> due to river conditions, and that the cost of possible salvage operations would exceed the possible market value for the steel commodity in question. We immediately request that you put your cargo underwriters on formal notice of our abandonment of the cargo.

Both sides dispute the meaning of these letters. Bruzzone testified that he was instructed to cancel the salvage contract so that Duferco could declare the cargo a constructive total loss. Bruzzone said that Duferco had not told him they were "abandoning" the cargo; rather Bruzzone picked up the term "abandon" from a Duferco attorney. Bruzzone claimed the purpose of the letter was to cancel the salvage contract. American Eagle contends that Plaintiffs, witness Michael Garin testified that the Plaintiffs considered Duferco's abandonment to be a total abandonment to the world, and the Plaintiffs had no intent of salvaging the cargo or asserting ownership until it did so in April 1995.

Based on the above letters the district court concluded that Duferco had abandoned the cargo on July 28, 1994. The Plaintiffs refused to accept the abandonment in August 1994. Then, in response to the court's declaratory judgment, ruling, the Plaintiffs made a partial payment to Duferco in the amount of $986,352.41 in exchange for an assignment of Duferco's rights, if any, against UMS. On February 1, 1995, Plaintiffs and Duferco executed an Assignment and Subrogation Receipt in return for payment on the claim. The Assignment and Subrogation Receipt provided that, "[the Plaintiffs] are entitled at [their] option to take over [Dufercols] interest in whatever may remain of goods, it being understood that delivery to [the Plaintiffs] of the document of title relating to goods shall not be construed

as an exercise of such option."

Based on this agreement, the court concluded that Plaintiffs had title to the steel. It held that, even though the Plaintiffs initially rejected the abandonment, they subsequently obtained title to the cargo pursuant to the Assignment and Subrogation Receipt. The court found that there was no "clear and convincing" proof presented at trial that the Plaintiffs expressly abandoned title.

On appeal, American Eagle and A.K. Steel focus on the district court's finding that the Assignment and Subrogation Receipt transferred title to the Plaintiffs. A.K. Steel argues that because Duferco abandoned the steel in July 1994 it no longer had ownership rights which it could transfer to the Plaintiffs on February 1, 1995.[13] Both A.K. Steel and American Eagle note that the Assignment only gave the Plaintiffs an option to take control of the sunken steel. However, the Plaintiffs did, not attempt to exercise the option until it learned of the salvage in late April 1995.

Even though the transfer of title from Duferco to the Plaintiffs is not entirely clear, we agree with the district court that there is no clear and convincing evidence that Duferco expressly abandoned title to the cargo before the Assignment to the Plaintiffs. The district court did not commit clear error in its factual findings that Duferco maintained

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[13] A.K. Steel notes that the Plaintiffs failure to accept the abandonment in August 1994 resulted in titled not passing to them. See Jones Towing, Inc. v. United States, 277 F. Supp. 839, 849 (E. D. La. 1967). Nevertheless, this argument does not defeat the presumption that Duferco retained title.

title to the cargo until the Plaintiffs entered into the Assignment and Subrogation Receipt with Duferco. We agree that A. K. Steel did not receive title to the steel slabs when it purchased the salvaged cargo from American Eagle.[14]

B. Conversion by American Eagle and A.K. Steel

The district court concluded that American Eagle and A. K. Steel were liable for negligent conversion of the cargo because they exercised control by sale, purchase and consumption of the steel. These acts totally interfered with the Plaintiffs, right to the steel. American Eagle argues that it should not be held liable for conversion because it had the right to transfer its possessory right and salvage interest to A.K. Steel. Again, we review the district court's findings of fact for clear error and legal conclusions de novo.

American Eagle correctly states that through a successful salvage effort it obtained a right of possession in the steel. To support this proposition, American Eagle suggests that "[o]ne so appropriating abandoned property, or any third person whom he may allow to take it, has a right to the property superior even to that of the former owner, and may hold it against him." Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960). American Eagle concludes that it had the right to transfer its possessory right and salvage interest to A.K. Steel, which it did on April 26, 1995.

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[14] We find no basis for A.K. Steel's claim that under choice of law rules the Plaintiffs, assertion of title should be governed by the laws of the United Kingdom.

The district court properly concluded that American Eagle and A.K. Steel committed negligent conversion. As already noted, the Plaintiffs maintained ownership and title over the steel under the law of salvage. The law of salvage prescribes how American Eagle must act as salvor of the Plaintiffs' steel. "Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purposes of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid." Columbus-America Discovery Group, 974 F.2d at 460 (quoting Benedict on Admiralty § 158 at 11-15 to 11-16.).

While American Eagle had a right of possession, it did not become the owner of the salved property by virtue of its services and could not transfer title to it. American Eagle "merely has a maritime lien granted by the general maritime law to ensure that [its] reward for saving property will be satisfied out of the property saved." Benedict on Admiralty § 157 at 11-13. Therefore, the district court's conclusion that American Eagle and A.K. Steel were liable for negligent conversion is correct. American Eagle and A.K. Steel had the duty to protect the salved property for the owner and the right to assert a claim against it for the cost of the salvage. [15]

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[15] American Eagle's citation to Wiggins, 186 F. Supp. at 456, is unpersuasive as that case concerned property whose owners had abandoned title. In this case, the court properly found that the cargo was only abandoned for salvage purposes.

C. Issues Raised by A.K. Steel on Appeal

1. Choice of law regarding the contract

A.K. Steel argues that the trial court erred by failing to perform an adequate choice of law analysis to determine what law should govern the contract between American Eagle and A.K. Steel. A.K. Steel asserts that Ohio law should govern because Louisiana conflicts of law analysis requires that a contractual choice of law provision be given effect unless there is statutory or jurisprudential law to the contrary. Delhomme Industries, Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir. 1982) (quoting Associated Press v. Toledo Investors, 389 So.2d 752, 754 (La. App. 3d Cir. 1980)). It contends that as a purchaser of salvaged goods, and not the salvor, maritime law should not apply.

We review choice of law questions de novo. Woodfield v. Bowman, 193 F.3d 354, 358 (5th Cir. 1999). Claims arising out of salvage operations are clearly within the admiralty jurisdiction of the federal courts. Treasure Salvors, Inc., 640 F.2d at 566. We have noted that "[d]isputes concerning the surveillance and sale of cargo are subject to being treated in admiralty." Coastal (Bermuda) Ltd. V. E.W. Saybolt & Co. Inc., 761 F.2d 198, 202 n.4 (5th Cir. 1985) Therefore, since the criteria for admiralty jurisdiction are met, we must apply federal admiralty and maritime laws and not state law.

2. Ohio Voidable Title Doctrine

A.K. Steel argues that the district court erred when it held that A.K. Steel had no claim or defense pursuant to the Ohio voidable title doctrine. However, because admiralty jurisdiction includes issues related to the sale of cargo, we apply federal admiralty law and not the Ohio voidable title doctrine in reviewing American Eagle's sale of the cargo to A.K. Steel.

Even if Ohio law did apply, A.K. Steel does not make a valid claim. The district court found that pursuant to a purchase order, American Eagle sold its possession and salvage interests to A.K. Steel and only warranted documentation of abandonment by owners to underwriters. The court said "American Eagle neither possessed nor transferred nor warranted title to the salvaged slabs to A.K. Steel."

The court then noted that the Ohio Voidable Title Doctrine could not apply in this case. The statute provides that: "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . . A person with voidable title has power to transfer good title to a good faith purchaser for value." Ohio Rev. Code § 1302.44(A). Because American Eagle did not purport to transfer title of any kind, the court found the statute to be inapplicable.

We review the court's factual findings under a clearly erroneous standard and its legal conclusions de novo. American Eagle never had title to the salvaged steel. Therefore, it could neither transfer nor warrant title to A.K. Steel. In addition, American Eagle never purported to transfer title. American Eagle's agreement with A.K. Steel

transferred rights, interest, and possession of slabs retrieved to A.K. Steel, including "rights, and possession in salvage and title rights, if any." The agreement included a warranty which provided "that the slabs have been abandoned for salvage by the owners /underwriters." Under the terms of this agreement, A.K. Steel should have expected to possess the steel but not receive title to it. Therefore, we agree that the voidable title doctrine is inapplicable.

3. Breach of warranty

A.K. Steel next argues that American Eagle breached its expressed warranty with A.K. Steel. A.K. Steel says that American Eagle warranted that the owners /underwriters had abandoned title to the steel allowing it to transfer full title to A.K. Steel, when in fact the steel had only been abandoned for salvage, thus American Eagle could not transfer title. A. K. Steel contends that under Ohio law a purchaser that relies on the express warranty of a seller of goods and suffers injury may sue to recover damages for breach of express warranty. Plastic Moldings Corp. v. Park Sherman Co., 606 F.2d 117 (6th Cir. 1979). Again, because this issue involves the sale of marine cargo, we must apply federal admiralty law and not state law.

Even if state law did apply, we conclude that there was no breach of warranty. First, American Eagle stated in its purchase order that it was selling "possession in salvage and title rights, if any" and that the "slabs had been abandoned for salvage." In addition, American Eagle refused to sell the steel to a buyer that demanded warranty of title, even though that buyer offered to pay more for the steel. Because

American Eagle did not purport to transfer anything but the rights it had "if any," it likewise did not expressly warrant to A.K. Steel that it was transferring title. Moreover, A.K. Steel, as the original purchaser, knew that the steel belonged to Duferco. Therefore, American Eagle cannot be liable for breach of warranty.

D. Issues Raised by Plaintiffs on Appeal

1. The salvage claim

The Plaintiffs first argue that the district court erred in finding that American Eagle and A.K. Steel possessed a valid salvage claim. With this valid claim, the district court subsequently granted American Eagle and A.K. Steel an award for salvaging the steel slabs, which was offset by the conversion judgment. Plaintiffs contend that American Eagle and A.K. Steel performed neither of the requirements to establish the right to a claim. They neither filed for a salvage lien nor returned the cargo to the owners. Since they failed to preserve the right to a claim, the right never existed.

The Plaintiffs do not dispute the court's finding that an initial salvage claim existed. A salvage claim exists when there is: (1) a maritime peril to the property; (2) voluntary service by the salvor; and (3) the salvage effort is successful in whole or in part. Schoenbaum, Admiralty and Maritime Law § 16-1 at 324. However, Plaintiffs correctly point out that the two defendants failed to preserve the right to the salvage claim within the two-year statute of limitations period.

Although the statute of limitations period for filing a salvage claim had passed, the district court concluded that A.K. Steel and American Eagle were entitled to assert a salvage claim as an affirmative defense and as a basis for recoupment in response to Plaintiffs, claim to quiet title. Citing Basic Boats, Inc. v. United States, 311 F. Supp. 596, 597 (E.D. Va. 1970), the court noted that "there is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation."

Plaintiffs argue that the district court misapplied Basic Boats because in that case the U.S. Navy defended against a damage claim with the shield of an expired salvage claim because it preserved the salvage right by returning the vessel to its owners. American Eagle and A.K. Steel, however, did not return the salvaged property to its owners.

We conclude that the court did not err in relying on Basic Boats. Although the two defendants did not preserve a salvage claim in the traditional manner, they did properly assert such a right as an affirmative defense and recoupment to Plaintiffs' claims. We must now determine whether or not A.K. Steel and American Eagle should receive a salvage award for their efforts. This question turns on a determination whether or not they acted in good or bad faith during the salvage and subsequent transfer of the steel.

2. Did American Eagle and A.K. Steel act in good faith?

A salvor has an obligation to bring aided property to a safe place for the eventual return to the owner. A salvor may not keep the salved property and, if she did so, would become liable for conversion. Benedict on Admiralty § 157 at 11-13. Justice Story noted that "[i]n cases of salvage, the party founds himself upon a meritorious service, and upon the implied understanding, that he brings before the court, for its final award, all the property saved with the entire good faith; and he asks a compensation for the restitution of the uninjured, and unembezzled by him." The Boston, 3. F.Cas. 932, 937 (1833).

A salvor obviously will not receive an award if he loses the property or acts in bad faith. But it is not entirely clear what constitutes bad faith. Storey noted that embezzlement by salvors must be punished by forfeiture of the salvage claim. *Id.* More recently this Circuit has said that admiralty courts must be vigilant in protecting mariners from unscrupulous and dishonest salvors. "[T]he law cannot tolerate salvors [sic] dishonesty, corruption, fraud, falsehood, either in rendering service, or in their proceedings to recover the salvage." Jackson Marine Corp. v. Blue Fox, 845 F.2d 1307, 1309 (5th Cir. 1988) (citing Church v. Seventeen Hundred and Twelve Dollars, S F.Cas. 669 (S.D. Fla. 1853)) . In addition, a salvor forfeits any award where he is guilty of gross negligence, looting or spoilage of the salved property. Admiralty and Maritime Law 16-4 at 329.

Based in part on these legal standards the district court found no bad faith on the part of American Eagle or A.K. Steel for salvaging and transferring the steel:

First, [Douglas] Adams' testimony confirms that he knew that the salvaged steel had been abandoned by Duferco in July 1994. Adams knew that if he salvaged the steel he could claim a possessory right of salvage only since he did not own the steel. Adams specifically chose the one purchaser who agreed to this term, namely that American Eagle only warrant abandonment of the cargo but not warrant title. Adams accepted a significantly lower bid in order to obtain this term because the higher bidder insisted on warranty of title, which Adams knew he could not do. Likewise, A.K. Steel purchased the salvaged steel without warranty of title, assuming the risk that its title to the steel could be challenged by plaintiffs.

The Court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle and the American Eagle would not have bothered to salvage the cargo were it unable to line up an acceptable purchaser in advance of its efforts. American Eagle successfully salvaged 128 slabs of steel, and did so in good faith, notwithstanding American Eagle's failure to halt delivery of the salvaged steel to plaintiffs on April 27, 1995, upon their assertion of ownership. A.K. Steel purchased the salvaged steel in good faith without warranty of title and immediately consumed the steel into production.

The Court finds no 'bad faith' on either American Eagle or A.K. Steel based on their unresponsiveness to plaintiffs' demand that sale, delivery and consumption of the salvaged steel should halt at the instant it asserted its ownership interest. The letter of July 6, 1994, stated that the cargo was abandoned. Significantly, the letter did not provide that the cargo was abandoned to the underwriters or anyone else.

The Plaintiffs argue that the court erred in these conclusions. Plaintiffs reiterate many of their earlier arguments against American Eagle and A.K. Steel, which Plaintiffs suggest all point to bad faith. First, American Eagle attempted to sell the steel even though. it knew it did not have title. American Eagle and A.K. Steel were both knowledgeable salvors and should have known that the cargo belonged to someone else. They bought and sold property that was not theirs even after the Plaintiffs wrote them insisting that they cease salvaging the cargo. Finally, the district court concluded that American Eagle and A.K. Steel were liable for negligent conversion. These acts, the Plaintiffs argue, all point to bad faith.

We review the district court's factual findings for clear error. The record reveals that American Eagle and A.K. Steel may not have acted entirely in good faith. Perhaps, they did not act in good faith when they ignored the Plaintiffs' request that they halt the sale, delivery and consumption of the salvaged steel.

Nevertheless, the district court did not commit clear error in determining that American Eagle and A.K. Steel did not act in bad faith nor commit gross negligence, embezzlement, fraud, or corruption. Until the April 1995 letter from the Plaintiffs asking them to cease the sale of the cargo, the only other communication regarding the cargo stated that it had been "abandoned." As discussed above, the purpose of ICA's abandonment letter was not crystal clear. American Eagle had some basis to believe it could salvage the steel and at least transfer a possessory interest. Consequently, A.K. Steel could expect to receive a possessory interest in

the steel. American Eagle knew that it did not have title to the steel and never attempted to transfer title. We agree with the district court that American Eagle and A.K. Steel acted negligently but their behavior did not rise to bad faith under the law.

3. The 20 percent discount

The district court reduced the cargo's value by 20 percent because the steel was salvaged, which would cause concern about possible damage from submergence, and because American Eagle did not have the steel's chemistries. The Plaintiffs contend that it was clearly erroneous for the district court to apply this discount, and this court should reverse and amend the judgment to reflect the steel's true value of $895, 000.[16]

The court applied this discount based on the testimony of Plaintiffs' value expert George Hynson. He testified that if the chemistries of the steel were unavailable the price could be reduced by 5 to 20 percent. Hynson testified that the discount was based on the seller not possessing the composition chemistries of the steel, which placed the seller at a disadvantage in negotiations to sell the cargo. However, Plaintiffs argue that they had the chemistries to the steel.

The district court reduced the spot market price of the steel not only because a purchaser would not have the chemistries; but in addition, because a purchaser would be

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[16] This figure is based on a $300 per net tonnage for the steel multiplied by the total tonnage of the steel. The district court reduced this figure by 20 percent to $240, thereby arriving at the $716,400 value.

concerned about the possible damage from submergence or salvage. This is a realistic concern. Therefore, we conclude that the court did not commit clear error in reducing the price of the steel.

4. The sunken tug

Plaintiffs also argue that the district court committed clear extent of coverage is determined by the words of the policy. We construe the policy's words and phrases using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. When the language is clear, the agreement must be enforced as written. Reynolds v. Select Properties, Ltd., 634 So.2d 1180, 1183 (La. 1994).

The policy's coverage provision states, "[i]nsurers agree to pay those sums that the Insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies . . . . The . . . 'property damage' must be caused by an '*occurrence*.' " (Emphasis added) . The policy defines '*occurrence*' as: "an *accident* including continuous or repeated exposure to substantially the same general conditions, which first take place during the policy period." (Emphasis added).

We look first to see if the events constituting conversion are within the coverage clause of this policy. Only if they are, do we consider the exclusionary provisions. We note that to have coverage the conversion of the steel must be an occurrence and to be an occurrence under this policy it must be an accident.

Black's Law Dictionary 15 (6th ed. 1990) defines an accident as "a fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens . . . ." As a salvor, American Eagle had the right to possess the steel and the duty to either return the steel to the Plaintiffs or file a salvage lien to obtain compensation. American Eagle did not do that. Instead, American Eagle intentionally transferred possession of the steel to A.K. Steel, who subsequently consumed the steel. This transfer, purchase and consumption negligently interfered with the Plaintiffs' ownership of the steel. Therefore, American Eagle and A.K. Steel committed negligent conversion.

This act was not an accident or a fortuitous event. American Eagle's and A.K. Steel's interference constituted more than an accidental or unexpected event. A reasonable person would not transfer, purchase and consume the steel without regard for the true owner's interest. Given the facts of this case, we conclude that American Eagle's and A.K. Steel's negligent conversion was not an accident, and thus is not covered by Britamco's insurance policy.

A.K. Steel contends that we should interpret American Eagle's negligent conversion pursuant to the policy's first exclusion to coverage, which provides that insurance does not apply to "' Property Damage' *expected or intended* from the standpoint of the insured." (Emphasis added). A.K. Steel notes that under some Louisiana law an occurrence clause includes intentional acts when the results

of the acts are unintended or unexpected. The Alert Centre, Inc. v. Alarm Protective Services, Inc., 967 F.2d 161, 164 (5th Cir. 1992). Therefore, it argues, the policy covers American Eagle's unintended negligent conversion. This argument is unpersuasive. First, because we concluded that negligent conversion was not an occurrence under the policy's coverage section, there is no need to apply the policy's exclusions. There is no coverage in the first place. Second, A.K. Steel cites case law which concerns policies having a broader definition of occurrence than Britamco's policy. See Id.; Auster Oil & Gas, Inc. v. Stream, 891 F.2d 570, 580 (5th Cir. 1990).

We reverse the district court and find no coverage under the Britamco policy. We therefore vacate the Plaintiffs' judgment against Britamco.

CONCLUSION

For the foregoing reasons, we affirm in part, reverse and remand in part, and reverse and vacate in part.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30875

FILED SEP 19, 2000

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE CO, LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD

Plaintiffs - Appellees - Appellants -
Cross Appellants - Cross Appellees

V.

UNIONE MEDITERRANEA DI SICURTA; EL AL

Defendants

AMERICAN EAGLE MARINE, INC

Defendant - Appellee - Appellant
Cross Appellant - Cross Appellee

V.

AK STEEL CORPORATION, formerly known as, Armco Steel Company, L P

Defendant - Appellee - Cross Appellant

V.

UMS GENERALI MARINE S.P.A., formerly known as Union Mediterranea Di Sicurta'

Defendant - Appellant - Cross Appellee

V.

BRITAMCO UNDERWRITERS, INC

Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITIONS FOR REHEARING

Before JONES, DUHE', and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX D

U.S. Const. Art. III., § 2, cl. 1.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

28 U.S.C. § 1254(l). Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1333. Admiralty, maritime and price cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

APPENDIX E

1. U.S. Foreign Waterborne Transportation Statistics, MARAD and U.S. Army Corps of Engineers (1999)

2. The U.S. Waterway System - Transportation Facts and Navigation Data Center U.S. Army Corps of Engineers (December 1999)

3. Casualty Salvage, International Salvage Union (October 2000) (internet reference http://www.marinesalvage.com/casualty.htm)

Supreme Court, U.S.
FILED
JAN 26 2001
OFFICE OF THE CLERK

(3)

No. 00-1046

In the Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; NORTHERN ASSURANCE CO., LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and A.K. STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A.K. Steel Corporation

LISTING OF ALL PARTIES TO THIS PROCEEDING

1. Steven Henry Arthur Adams, for Himself and as Representative of Certain Underwriters at Lloyd's, Petitioner

2. Indemnity Marine Assurance Company, Ltd., Petitioner

3. The Yorkshire Insurance Company Limited, Petitioner

4. Commercial Union Assurance Company, PLC, Petitioner

5. Phoenix Assurance PLC, Petitioner

6. Cornhill Insurance PLC, Petitioner

7. Norwich Union Fire Insurance Society, Ltd., Petitioner

8. Northern Assurance Company, Ltd., Petitioner

9. Skandia UK Insurance PLC, Petitioner

10. Ocean Marine Insurance Company, Ltd., Petitioner

11. Folk Sam International Insurance Company (U.K.) Ltd., Petitioner

12. Scottish Lion Insurance Company, Ltd., Petitioner

13. Wurttembergische Feuerversicherung, AG, Petitioner

14. Sphere Drake Insurance PLC, Petitioner

15. Dai-Tokyo Insurance Company (U.K.) Ltd., Petitioner

16. UMS Generali Marine S.p.A., formerly known as Union Mediterranea Di Sicurta

17. American Eagle Marine, Inc., Respondent

18. A.K. Steel Corporation, formerly known as Armco Steel Company, L.P., Respondent

19. Britamco Underwriters, Inc.

20. COURTENAY, FORSTALL, HUNTER & FONTANA,
Francis A. Courtenay, Jr.
John D. Fitzmorris, Jr.
Kirk N. Aurandt
Counsel for Petitioner

21. GELPI, SULLIVAN, CARROLL & GIBBENS
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Paul C. Miniclier
Counsel for A.K. Steel Corporation, Respondent

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Robert I. Siegel
Nathan Schwartz
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24. PHELPS, DUNBAR, L.L.P.
Christopher O. Davis
Counsel for UMS Generali Marine S.p.A.

RULE 29.6 STATEMENT

A. K. Steel, Inc. is a wholly-owned subsidiary of A.K. Steel Holdings Corporation, a publically traded corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; NORTHERN ASSURANCE CO., LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and A.K. STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A.K. Steel respectfully submits the following Brief in Opposition to the Petition for Writ of Certiorari filed by Steven Henry Arthur Adams, et al., to the United States Court of Appeals for the Fifth Circuit to review the Judgment of the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reproduced as Appendix A to Petitioners' Petition for Writ of Certiorari.

The Fifth Circuit Court of Appeals entered Judgment on September 19, 2000. The opinion of the United States Court of Appeals for the Fifth Circuit is published as Adams, et al v. Unione Mediterranea de Sicurta, et al, 220 F.3d 659 (5th Cir. 2000) and is reproduced as Appendix B to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Art. III § 2 and 28 U.S.C. § 1333.

STATEMENT OF THE CASE

Contrary to petitioner's arguments, the issue on appeal is did the lower courts commit reversible error by allowing the good faith salvor, American Eagle[1], and good faith purchaser, A.K. Steel, to set off an award of damages through recoupment of the salvage lien?

In an attempt to elevate the importance of a case which petitioners acknowledge "is not important in itself", petitioners try to portray the respondents as "seagoing opportunists"and cast aspersions by referring to respondents as embezzlers and privateers. Petitioners also decry the lower courts' decisions as overturning two centuries of this Court's precedent and bemoan the potential impact of the decision on world commerce. During this lengthy foreshadowing of doom, petitioners' writ chooses to ignore acknowledging the factual finding by the district court that there was no proof of bad faith on the part of American Eagle or A.K. Steel. Equally as important, petitioners' writ fails to cite a single case in support of their argument that the lower courts committed reversible error by allowing a good faith salvor and purchaser to setoff an award of damages, through recoupment, of the salvage lien.

Rather than overturning centuries old precedent or severely impacting the world's shipping business, this case is

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[1]American Eagle has filed a waiver with the Court and will not be filing an opposition to this writ application. This decision is based on American's Eagle's bankruptcy and finding of no coverage by the Fifth Circuit as to American Eagle's underwriter, Britamco.

simply an appeal by a losing party whose identical arguments were made to and rejected by the lower courts. The simple fact is petitioners failed to prove that American Eagle's or A.K. Steel's conduct arose to the level of bad faith so as to warrant a forfeiture of the salvage lien. Likewise, allowing a good faith salvor and purchaser to recoup their lien through the use of an affirmative defense does not run counter to, or overturn, this Court's precedent. Rather, such an equitable application of recoupment is exactly the type of public purpose that the law of salvage was designed to foster-- the encouragement of salvors to undertake their often dangerous mission.

This case involves nothing more than the lower courts allowing a good faith salvor and purchaser the opportunity to recoup a salvage lien. As adeptly stated by the district court, "(t)his conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs(petitioners)". Nothing in the lower courts' decisions warrants this Court's review.

STATEMENT OF THE FACTS

As required by this Court's rules, A.K. Steel will delineate petitioners' material omissions of facts by stating a more complete synopsis of the relevant facts. The following are excerpts of the factual and legal findings of the district court, as well as uncontested facts.

- On October 16, 1993, Duferco owned the steel when it sank.

- Duferco hired the Italian Claims Agency ("ICA") as its agent for purposes of coordinating salvage of the cargo. ICA, in turn, hired American Eagle to salvage the steel on January

31, 1994. (Petitioners' Appendix, Exhibit a, page 5, hereinafter designated "Pet. App. A-5").

•From January 31, 1994 to July 6, 1994, American Eagle was unable to salvage the steel slabs because the water level of the Mississippi was too high. (Pet. App. A-7)

•On June 10, 1994, petitioners filed their declaratory action regarding insurance coverage. While A.K. Steel was named as a defendant in this suit, it never became a party and was dismissed without prejudice on January 16, 1995.

•On July 6, 1994, ICA canceled the salvage contract with American Eagle, stating in a letter that "we are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." (Pet. App. A-8)

•On July 28, 1994, Duferco "abandoned" the cargo. (Pet. App. A-8)

•On August 23, 1994, Petitioners refused to accept the abandonment of the steel slabs by Duferco. (Pet. App. A-8-9)

•In January 1995, American Eagle first contacted A.K. Steel regarding the salvage and sale of the steel. (Pet. App. A-11)

•American Eagle would not have salvaged the steel if it was unable to locate an acceptable purchaser in advance of its efforts. (Pet. App. A-15)

•On February 1, 1995, and unbeknownst to American Eagle or A.K. Steel, petitioners paid Duferco $986,352.41 in settlement of the insurance dispute and executed an assignment and release which the district court later

determined at trial to have transferred ownership of the steel to petitioners. (Pet. App. A-9)

• From February 18, 1995 through April 26, 1995, American Eagle salvaged 128 of the steel slabs at high cost and with great risk associated with the task. (Pet. App. A-13)

• Petitioners did not seek to assert any ownership interest in the steel slabs until after the salvage operation was completed. (Pet. App. A-13)

• Petitioner had no intention of asserting ownership, selling or salvaging the sunken cargo. (Pet. App. A-10, 13)

• In early March 1995, American Eagle sought possession of the chemical composition of the steel from Duferco, in order to maximize the value of the steel. (Pet. App. A-11-12)

• On March 4, 1995, Duferco gave permission for the steel's "chemistries" to be released to American Eagle, thereby making apparent that Duferco was not interested in purchasing the salvaged steel. (Pet. App. A-12)

• A.K. Steel made the only acceptable bid on the steel. (Pet. App. A-12)

• On March 8, 1995, the contract between American Eagle and A.K. Steel was finalized. The contract required that American Eagle "warrant and document" that the steel had been abandoned by "owners/underwriters." (Pet. App. A-13)(Respondent's Appendix, Exhibit A, hereinafter designated "Res. App. A").

•On April 24, 1995, counsel for petitioners learned of the ongoing salvage operation by American Eagle. (Pet. App. A-13)

•On April 26, 1995, American Eagle completed the successful salvage of 128 of the 158 sunken steel slabs and delivered 127 slabs to A.K. Steel. (Pet. App. A-13)

•On April 27, 1995, American Eagle received the final payment for the steel from A.K. Steel. (Pet. App. A-13)

•American Eagle salvaged the steel slabs in good faith. (Pet. App. A-18)

•American Eagle was paid $525,424.32 by A.K. Steel or $176 per ton. Out of this sum, American Eagle had salvage expenses of $450,198.91 and profit of $75,225.41. (Pet. App. A-13, 15)

•A.K. Steel purchased and consumed the salvaged steel in good faith. (Pet. App. A-15)

•On April 27, 1995, counsel for petitioners contacted petitioners to advise of the salvage and request permission to put the salvor on notice. (Pet. App. A-13)

•On April 27, 1995, counsel for petitioners advised petitioners that American Eagle's actions would give rise to a salvage claim and that petitioners should "keep in mind" that they would have had to raise the steel slabs anyway at a significant cost to underwriters. (Pet. App. A-13-14; Res. App. B)

- On April 27, 1995, petitioner advised American Eagle of its alleged ownership. (Pet. App. A-14)

- On May 5, 1995, petitioners advised A.K. Steel of its alleged ownership interest.

- Apart from these generic threats, petitioners took no emergency legal action in May 1995 to gain possession of the cargo, halt delivery or prevent consumption. (Pet. App. A-17)

- On August 15, 1995, petitioners amended their declaratory action to add American Eagle and A.K. Steel as defendants and sought to negate the sale between the respondents. (Pet. App. A-14)

- On November 29, 1995, American Eagle filed its Answer and Defenses which specifically raised the defense of a maritime lien for the salvage services. (Res. App. C).

- On December 21, 1995, A.K. Steel filed its Answer and Defense, as well as a Declaratory Action to Quiet Title.

- On December 24, 1997, A.K. Steel amended its Answer and Defenses without opposition and specifically raised the alternative affirmative defense of set off of the salvage lien. (Pet. App. A-32; Res. App. D).

- Petitioners did not challenge the basic elements of American Eagle's salvage claims; 1) peril to property, 2) voluntary service and 3) successful salvage. (Pet. App. A-35)

- Petitioners presented no evidence at trial that the salvage effort was negligently performed, that the salvage expenses

were unreasonable, that the job could have been more efficiently, easily or successfully performed. (Pet. App. A-16)

•On June 19, 1998, the district court awarded petitioners total damages of $827,277.06 or 83.87% of its payment to Duferco. Petitioner was awarded $789,081.93 against UMS GENERALI MARINE S.p.A. ("UMS") or 80% of the coinsurance dispute. Petitioner was awarded $38,195.13 against American Eagle and A.K. Steel or 20% of the salvage dispute damages. UMS was awarded $152,780.55 or the remaining 80% of the salvage dispute damages. (Pet. App. A-40)

SUMMARY OF THE ARGUMENT

Petitioners would have this Court believe that the lower courts' decisions would overturn the centuries old precedent of this Court, impact on world commerce and divest the federal courts of admiralty jurisdiction. While this argument may be a novel way to pique this Court's curiosity in order to have a writ accepted, the dramatic prose and dire predictions ignore the fact that this is a relatively simple substantive and procedural case which does not portend the ill effects foreshadowed by the petitioners.

This case involves the salvage, sale and consumption of steel slabs, which the salvor and purchaser believed to have been abandoned by the owner, and the subsequent litigation over the ownership of that steel and/or right to offset any damages with the the recoupment of a salvage lien.

The case in a nutshell is as follows: Prior to the salvage of the steel, the steel's owner, Duferco, had abandoned it. Based on this belief, American Eagle

commenced the salvage and sold its rights to A.K. Steel. As part of that contract, A.K. Steel required American Eagle to "warrant and document" the abandonment of the steel by "owners/underwriters." Subsequent to the salvage, sale and consumption of the steel, the new alleged owners, petitioners, filed a declaratory action to negate the sale of the steel between respondents. In turn, American Eagle filed its answer and defenses which specifically denied the alleged ownership of petitioners and raised as an affirmative defense its lien for salvage services. Likewise, A.K. Steel, filed its answer and a declaratory action to quiet title. Subsequently, A.K. Steel amended its pleadings without opposition to specifically include, alternatively, an affirmative defense of the salvage lien as an offset to any damages. At trial, the district court held that the law of finds did not apply to the steel because, while the original owner, Duferco, had abandoned the steel, the respondents had not shown by "clear and convincing" evidence that Duferco had intended a complete abandonment of title. Therefore, petitioners' subsequent insurance payment and execution of release transferred ownership of the steel to petitioners.

The district court found that, while both American Eagle and A.K. Steel had acted in "good faith", they had negligently converted the steel. In turn, the district court found that both American Eagle and A.K. Steel had, through the use of affirmative defenses, preserved the right to set off the award of damages to petitioners and UMS by recoupment of the salvage lien.

Contrary to the assertions of petitioners, the lower courts simply allowed a "good faith" salvor and purchaser the opportunity to set off an award of damages through the use of affirmative defenses to recoup their salvage lien. The use of

the well established procedure of using an affirmative defense to allow a salvor and purchaser the opportunity to recoup the extensive salvage expense does not run contrary to this Court's precedent. Rather, it runs parallel to and in conjunction with the primary purpose of salvage law- to encourage the "good faith" salvor to undertake the arduous and hazardous salvage of imperiled goods. Moreover, the use of recoupment as an affirmative defense is well recognized by this Court.

Petitioner, on the other hand, would have this Court fashion a rule that a "good faith" salvor, who asserts his salvage lien by means of an affirmative defense instead of a separate action, is not entitled to offset an award of damages with the salvage lien. In other words, the petitioners wants a rule that allows petitioners the full benefit of the salvor's efforts without having to spend a single penny. Such a ruling runs counter to the equity basis of an admiralty court's jurisdiction and would have the effect of discouraging, not encouraging, salvage. Moreover, and as the district court found, such a ruling would result in an unjust enrichment in favor of the petitioners.

Salvage law allowed the petitioners the opportunity to prove that American Eagle's and A.K. Steel's conduct warranted the forfeiture of the salvage lien, but they were unable to prove the requisite bad faith. Instead, the lower courts followed established procedural law and fashioned an equitable remedy by allowing a "good faith" salvor and purchaser to offset a damages award by recoupment of the salvage expenses. This holding by the lower courts does not contravene the precedent of this Court nor cause the myriad of other dire predictions of the petitioners. As such, the Court should not accept this writ application.

ARGUMENT

A. WHETHER THE LOWER COURTS COMMITTED REVERSIBLE ERROR BY ALLOWING A GOOD FAITH SALVOR AND PURCHASER TO SET OFF AN AWARD OF DAMAGES THROUGH THE RECOUPMENT OF THE SAVAGE LIEN?

The general principle of recoupment is applicable to the law of salvage and allows a good faith salvor and purchaser the right to offset an award of damages with the salvage lien. The lower courts use of recoupment to allow such an offset was neither an error nor in contravention to this Court's precedent.

On the other hand, the overwhelming majority of petitioners' writ chooses to ignore answering this question. Rather than responding to this issue, petitioners spend nearly all of their brief setting forth lengthy quotations from cases with ancillary relevance in an attempt to deflect an analysis of this issue and try to create a conflict with this Court's precedent where none truly exists.

1) THE USE OF AN AFFIRMATIVE DEFENSE TO ALLOW THE RECOUPMENT OF A SALVAGE LIEN BY A GOOD FAITH SALVOR AND PURCHASER IS NOT AN ERROR

According to petitioners, a salvor must either return the property to the owner and proceed in personam against the

owner, or file an action in rem against the res in order to preserve a salvage lien. While the petitioners provide a number of lengthy quotations, their writ does not provide a single legal citation to support the argument that a salvage lien must be "exclusively" preserved by these two methods. While these cases provide guidance regarding the prosecution of a salvage lien, they offer no assistance in the analysis of the defensive application of a salvage lien. In fact, Petitioners' argument completely avoids discussing the defensive use of a salvage lien as a recoupment in litigation over the ownership of salvaged goods.

a) Equity: The Lower Courts' Perspective of a Good Faith Salvage Lien

In analyzing the arguments regarding the alleged errors of the lower court, this Court should view the arguments from the district court's perspective of the evidence. Here, the district court was faced with the reality that, absent American Eagle's salvage efforts, there would have been no salvage claim because petitioners had no interest in salvaging the steel until after it was salvaged. (Pet. App. A-16-17). Moreover, American Eagle and A.K. Steel had received notice that the owner, Duferco, had abandoned the steel and had no notice of petitioners alleged ownership of the steel until after the extensive salvage efforts and final contract payment had been made. In other words, the district court was faced with a case where it found the conduct of the respondents to have been in good faith but within the context of a claim for negligent conversion of salvage goods. Couple these finding with petitioners' acknowledgment that American Eagle's salvage would give rise to a salvage claim and that underwriters would also have had incurred

significant cost to salvage the steel (Pet. App. A-14; Res. App. B) and the district court could reach only one logical and equitable conclusion – allow the offset of the award of damages by recoupment of the salvage lien. To hold otherwise would deprive a good faith salvor credit for his efforts and result in an unjust enrichment to the petitioners. (Pet. App. A-33)

Regarding the latter, this Court should take into account the equitable considerations of the district court regarding the potential for the unjust enrichment of petitioners. In its judgment, the district court explains its rationale for finding that respondents had negligently converted the steel, while at the same time allowing respondents to set off their salvage expenses against the judgment in favor of petitioners: "(t)his conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs (petitioners)." (Pet. App. A-33).

As a court sitting in admiralty, the district court was compelled to take such equitable considerations into account in making its determination in this regard. Norris, *Salvage* §6 (1958)(stating that admiralty courts of seafaring nations universally recognize the proposition, derived from Roman law, that admiralty courts must prevent the unjust enrichment of claimants). See also, Vernicos Shipping Co. v. United States, 349 F.2d 465 (2nd Cir. 1965). In the instant case, the district court was faced with a situation in which a salvor saved goods it thought to be abandoned, and sold those good to a third party. The district court found this conduct to be negligent, as petitioners were ultimately found to be the owners of the salvaged goods, and awarded petitioners

damages equal to the value of the steel for respondents' negligent conversion thereof.

However, the district court went on to point out at numerous times in its opinion that the cargo was lost and valueless until respondent American Eagle salvaged the cargo, incurring considerable expense in so doing. The district court further recognized that to allow petitioners to recover the value of the cargo without having to pay for its salvage would amount to unjust enrichment accruing to petitioners in excess of $500,000.00. The district court and United States Fifth Circuit Court of Appeals found such a concept hostile to their respective senses of equity and justice. This Court should consider the unjust enrichment of petitioners when deciding on their writs requested relief.

b) Recoupment of a Salvage Lien

"At common law the term 'recoupment' described a claim that could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It was purely defensive in character and could only be used to defeat or diminish plaintiff's recovery; recoupment could not be the basis for affirmative relief." Wright & Miller, *Federal Practice and Procedure*, §1401 (West 1995). A.K. Steel respectfully submits that the established case law and Federal Rules of Civil Procedure allow the recoupment of a salvage lien through the use of an affirmative defense.

The district court and circuit court were well within their discretion to allow respondents' salvage lien claim to be asserted as an affirmative defense by means of recoupment, based upon the succinct analysis presented in Basic Boats, Inc. v. United States, 311 F.Supp. 596 (E.D. Va. 1970).

In Basic Boats, the owner of a sailing ketch known as CONJUR MAN sued the United States for alleged damage done to the CONJUR MAN in salvage efforts performed by the destroyer USS WALLACE L. LIND on July 27, 1967. The United States filed its answer and counterclaim, the latter asserting a claim for salvage.

The plaintiff moved for a dismissal of the counterclaim as being time barred under 46 U.S.C. §730.[2] While the Basic Boat court found the salvage counterclaim untimely, it still allowed the United States to assert its salvage claim as an affirmative defense. The court reasoned:

> Since the facts supporting the counterclaim undeniably arose out of the same cause of action which gives rise to plaintiff's suit, there is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation. Pennsylvania R.Co. v. Miller, 124 F.2d 160 (5th Cir. 1941); Luckenbach Steamship Co. v. United States, 312 F.2d 545 (2nd Cir. 1963); United States v. Western Pac.R.R., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

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[2]In the instant case the statute of limitation for salvage claims is not an issue on appeal because petitioners never asserted a defense based upon the two-year limitation period of 46 U.S.C. §730. Also, American Eagle raised the lien status in its answer to petitioner's lawsuit and A.K. Steel amended its answer without opposition to raise the affirmative defense of recovery of the salvage lien. (Res. App. - D) F.R.C.P. 15(c).

In coming to this conclusion, the court in Basic Boats cited Wright, *Federal Courts*, §79 (1963) for the proposition that "the better rule is that a counterclaim, which arises out of the same cause of action, may be asserted for the purpose of recoupment to prevent or reduce a judgment, even though affirmative relief will not be given on such counterclaim if it is time-barred."

Recoupment, the setting off against asserted liability by means of an affirmative defense, is not barred by a statute of limitations so long as the main action is timely. Reiter v. Cooper, 507 U.S. 258, 264, 113 S.Ct. 12132, 122 L.Ed.2d 604 (1993). In Reiter, this Court was presented with an issue under the Interstate Commerce Act regarding a counterclaim based on reasonable rates and the argument that it was barred by a two year statute of limitation. In acknowledging that recoupment, as a general rule, is not barred by a statute of limitation if the main action is timely, the Court also confirmed that the general principle of recoupment is applicable in other contexts. Id. at 264. While the case at bar does not raise the issue of the respondents' affirmative defenses being barred by a statute of limitation, it most certainly raises the issue of the scope of application of the general principle of recoupment.[3]

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[3]In its decision, the district court mistakenly held that A.K. Steel amended its "answer and counterclaim" to assert a salvage lien on December 24, 1997 and, therefore, the counterclaim was barred because of the two year statute of limitation. (Pet. App. A-32) This mistake was compounded by the Fifth Circuit's decision. (Pet. App. B-29-30). On December 24, 1997, A.K. Steel amended its answer and defenses, complaint for declaratory action and cross claim to include the "affirmative defense" regarding the right to set off the salvage expenses. A.K. Steel did not file a counterclaim. (Res. App. D). Under *Fed R. Civ. P.*, Rule 15(c), the affirmative defense relates back to its original filing of petitioner's complaint because it arose "out of the same conduct, transaction or occurrence."

Recoupment "is a defense that goes to the foundation of plaintiff's claim by deducting from plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same contract or transaction." Distribution Services, Ltd. v. Eddie Perter Interests, Inc., 897 F.2d 811, 812 (5th Cir. 1990)(citations omitted). As a purely defensive procedure, it is available to defendant so long as plaintiff's claim survives. Id. at 813. In Distribution Services, the Fifth Circuit was faced with the issue of a "counterclaim" for cargo damage brought by way of recoupment being barred by the two year statute of limitation in the Carriage of Goods by Sea Act. 46 U.S.C.A. App. §1303(6). The Fifth Circuit held that a recoupment defense was still viable even if the affirmative cause of action was precluded by the statute of limitations. Id. It is thus clear that the general principle of recoupment is not foreign to admiralty courts.

In fact, admiralty courts have long held that a property owner may set off a salvage award with the damage to the salved property which is caused by the salvor's ordinary negligence. Schoenbaum, *Admiralty and Maritime Law*, §16.4, 3rd Ed. (2001). It stands to reason then that such a set off should be allowed in the opposite case where there is a suit for ownership and a request for set off of any damages by recoupment of a good faith salvage lien.

The reasoning applied in Reiter, Distribution Services, and Basic Boats, which relies on the doctrine of recoupment, is equally applicable to this case. Believing themselves to be the rightful owners of the abandoned steel, A.K. Steel initially filed a declaratory action to quiet title, while American Eagle's defenses to petitioners' suit specifically raised the lien status of their salvage services.(Res. App. C). When it became apparent that petitioners could possibly be deemed the owners

of the steel, A.K. Steel amended its answer without opposition to raise the affirmative defense of recovery of the salvage lien. (Res. App. D). Like the United States in Basic Boats, respondents did not seek to prosecute a salvage lien, but only sought to assert it as a defense in response to the affirmative actions of plaintiffs. Thus, like the court in Basic Boats, the district court in the instant case recognized that defendants/respondents were still entitled to credit for their good faith salvage efforts which ultimately benefitted plaintiffs/petitioners. Such reasoning is firmly grounded in law and is consistent with the facts of this case. Thus, this Court should leave the lower courts' judgment undisturbed.

Petitioners attempt to distinguish Basic Boats from the case at bar. Petitioners state that Basic Boats "does not, in any sense, support to the court's reasoning. The only reason that the U.S. Navy could successfully plead set-off was because it had returned the res to the owner." Petitioners, however, misconstrue the nature of a recoupment defense.

Recoupment allows a defendant to deduct from a plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same transaction. Reiter supra; Distribution Services, Id.; Basic Boats, supra. The doctrine of recoupment does not require the cause of action through which recoupment is sought to stand on its own with respect to all elements of recovery. To the contrary, the doctrine of recoupment only allows a defensive claim for the purpose of set-off to be asserted, even if affirmative relief on such a cause of action could not be granted. Reiter, Id.; Distribution Services, Id.; Basic Boats, supra.

In the instant case, the district court made the factual finding that respondent American Eagle salvaged the steel in

good faith and that A.K. Steel purchased and consumed the steel in good faith. (Pet. App. A-15) Equally as important, petitioners offered no proof of respondents bad faith. (Pet. App. A-35) The district court further found that "Plaintiffs [Petitioners] offered no evidence that the salvage effort was negligently performed, that the salvage expenses were unreasonable, that the job could have been more efficiently, easily, or successfully performed." (Pet. App. A-16). Therefore, the district court concluded that respondents were entitled to assert recoupment of the salvage lien as an equitable defense to petitioners' claims. (Pet. App. A-33)

The district court, sitting as an admiralty court, was within its authority to determine that respondents were entitled to a recoupment defense for their salvage efforts. Indeed, any salvor's right to a salvage lien is to be determined on a case by case basis. Jackson Marine Corp. v. The Blue Fox, 845 F.2d. 1307, 1309 (holding that the appropriate response to a finding of fraud or misrepresentation on a salvor's right to a salvage lien will depend on the facts of the particular case). While admiralty courts have traditionally been vigilant in protecting mariners from unscrupulous and dishonest salvors, The Belle Corrunes, 19 U.S. 152, 5 L.Ed. 229 (1821), this vigilance has been based on the heightened vulnerability of a distressed ship and crew to exploitation by salvors ("the law cannot. . . tolerate salvors' dishonest, corruption, fraud, falsehood, either in rendering the service, or in their proceedings to recover the salvage." Church v. Seventeen Hundred and Twelve Dollars, 5 F. Cas. 669 (S.D. Fla. 1853)).

In this case, petitioners were not in a heightened state of vulnerability, nor were they at the mercy of the salvors. They were simply uninterested in seeing the steel salvaged

until after that act had been accomplished by another. Thus, when reviewing this case on its particular merits, as an admiralty court is compelled to do, the district court concluded that respondents' actions did not require a forfeiture or reduction in their salvage claim. Such a factual finding, affirmed as it was by the United States Fifth Circuit Court of Appeals, was not manifestly erroneous.

2) PETITIONERS' WRIT: SALVAGE JURISPRUDENCE THRU VIABILITY OF THE SALVAGE CLAIM

a) The Court's Precedent - A Bad Faith Salvor is Not Entitled to a Salvage Award

In an effort to elevate the impact of the lower courts' decisions, petitioners' writ begins with the axiomatic concept of salvage law that a bad faith salvor forfeits his entitlement to a salvage lien. While respondents do not deny that this is a correct statement of law, it is irrelevant to the true issue of this writ application, i.e. the lower courts' error, because the district court found that the respondents' efforts in salvaging and purchasing the steel were in <u>good faith</u>. (Pet. App. A-15)

However, a historical review of this Court's precedent does put the lower courts' allowance of the recoupment of the salvage lien in perspective. As such, a review of the cases cited by petitioners is instructive with regard to the true nature of respondents' conduct and petitioners' failure to prove bad faith.

Petitioners cite Mason v. The Blaireau, 6 U.S. 240 (1804), for the proposition that a salvor who attempts to embezzle salvaged property should forfeit his salvage award.

In the instant case, however, the district court found no nefarious intent on the part of respondents. In fact, the district court held that "there was no proof of bad faith on the part of A.K. Steel or American Eagle with respect to salvage, sale and purchase of the steel slabs." (Pet. App. A-35). To the contrary, the district court commended American Eagle for its efforts in salvaging the steel when it stated: "The court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle. . . ." Rather than treating respondents as embezzlers of the salvaged property as suggested by petitioners, the district court found American Eagle and A.K. Steel had acted in "good faith". (Pet. App. A-15).

Petitioners next cite Rowe v. The Brig, 20 F.Cas. 1281 (Cir. Ct. Mas. 1818) for the pronouncement of the policies behind the law of salvage and for the proposition that petty plunderage and concealment of the salvaged property has to be discouraged. However, this proposition again has no connection to the facts of this case because of the respondents' good faith. Likewise, the district court found that its holding did promote the policies of salvage law. (Pet. App. A-33).

The petitioner's next citation to The Bello Corrunes, 19 U.S. 152 (U.S. 1821) is for the same proposition that spoilation or gross neglect warrants the forfeiture of the salvage award. In The Bello Corrunes, the Court stated the petitioners' "libel for salvage, to be not only groundless but impudent, for, besides spoilation, smuggling, the grossest

irregularities, it is perfectly clear from the pilot's evidence that they ran the vessel on the shore purposely." In the case at bar, petitioners had no proof of any bad faith by the respondents. (Pet. App. A-35)

Petitioners also cite The Boston, 3 T. Cas. 932 (Cir. Ct. of Mass. 1833), again for the proposition that a salvor must carry out his duties in good faith. The court in The Boston states: "The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restitution, and incorruptible vigilance, so far as the property is within the reaching or under the control, of the salvors." Petitioners once again ignore the fact that the district court found respondents to have acted in good faith and that petitioners had no proof of bad faith. Equally as important, this citation ignores the simple fact that the ownership of the steel was the first and foremost issue in dispute between the parties at trial.

Petitioners make further citation to Norris, *Benedict on Admiralty* (7th Ed. Rev. 1999). Norris, however, confirms that the total forfeiture of the salvage award is only appropriate when the property has been "looted, stolen, concealed, unlawfully appropriated, embezzled, destroyed, etc. and the proof of such acts has been established beyond a reasonable doubt." Id. at §104, pg. 8-16. (Petitioners Writ at p.14)(emphasis added). Petitioners, however, failed to meet that burden of proof.

Norris also discusses the salvor's duty regarding the property and ends the quotation cited by petitioners as follows: ". . . The salvor does not simply have the right to keep the salvaged property and should he do so, would become subject to a suit for conversion." (Petitioner's Writ at

p. 15)(emphasis added). In the case at bar, the petitioners brought just such a suit for conversion. The true issue on appeal, however, is in a suit for conversion can a good faith salvor and purchaser recoup the salvage lien by means of an affirmative defense?

b) From Uniformity with International Law To Viability of the Salvage Claim

The next litany of headings in the petitioners' writ begins with a discussion of the uniformity of international law, continues through the potential impact on foreign commerce and federal admiralty courts and ends with an argument regarding the viability of the salvage claim. Aside from the obvious attempt to expand the alleged impact of lower courts' decision to the wider world, the premise of all of these sections of petitioners' argument is that the lower courts' decisions is a significant departure from this Court's precedent. As discussed previously, the lower courts' decision which allowed a good faith salvor and purchaser to offset an award of damages through the recoupment of the salvage lien is not a departure from this Court's precedent.

Not surprisingly, petitioners' argument relating to the uniformity of international law contains no citation, nor for that matter, any argument pertaining to the perceived impact on the true issue before this Court.

Likewise, petitioners' discussion regarding the exclusive power of this Court to change the law ignores the simple fact that the lower courts of this country have fashioned the law within the precedent and parameters of this Court's decisions for over 200 years.

Petitioners' section on "technological revolution" is of no moment to the case at bar because technology does not impact the right of a good faith salvor and purchaser to compensation or credit for the salvage lien.

Petitioners' discussion relating to the potential effect on interstate and foreign commerce presupposes the creation of uncertainty in the law. Contrary to petitioners' arguments, the lower courts' decisions do not create any uncertainty or contradiction in the law. Rather, the lower courts' decisions simply reaffirm this Court's precedent that a good faith salvor has a duty to preserve the salvage goods for the owner's interest and not to sell or convey the salved goods without an adjudication of the title in a court of competent jurisdiction. Failure to do so will result in an award of damages for conversion. These decisions also reaffirms that a good faith salvor has the right to receive credit for his efforts in salvaging goods for the benefits of its owner, and further demonstrates admiralty courts' universal disdain of unjust enrichment.

Such a ruling does not cast maritime commerce into chaos nor affect the authority of federal admiralty courts. Nothing in the lower courts' decisions has any impact on a federal admiralty court's jurisdiction to adjudicate the salvage claims. As such, the lower courts' decisions does not create the two systems of law alleged by petitioners.

The final section of petitioners' writ discusses the viability of the respondents' salvage claim. This section of petitioners' writ raises an issue for the first time on appeal-the nonexistence of the salvage lien. In light of petitioners' failure to raise this issue before the lower courts, the argument should not be considered. Grubbs v. General Electric Credit

Corp., 405 U.S. 699 (1972) (stating the general proposition that issues cannot be raised for the first time on appeal and are, therefore, waived); see also, Meglio v. Merit Sys. Protection Bd., 758 F. 2d 1576 (Fed. Cir. 1984).

On its merits, petitioners' discussion of viability confuses the assertion of the salvage lien for defensive purposes with the prosecution of the lien as a separate action. Petitioners incorrectly argue that because the steel was consumed respondents could not bring an in rem action nor in personam action against petitioners because of their lack of possession of the steel. The case at bar is not about the prosecution of a salvage lien as a separate action but, rather, the defensive use of the lien as a set off in a suit over ownership of the steel.

Finally, petitioners' argument on viability ignores the inherent power of admiralty courts to fashion equitable relief when facts and circumstances require. Here, the district court found good faith, and, to avoid an unjust enrichment to petitioners, allowed respondents to recoup the salvage lien. This decision is not in contravention of this Court's precedent nor does it create any confusion. A.K. Steel respectfully submits that there was no error by the lower courts and petitioners' writ should be denied.

CONCLUSION

A review of petitioners' conclusion to their writ provides the Court with the true perspective on what the respondents, American Eagle and A.K. Steel, have had to endure for the last five years of litigation. From "embezzlers" to "pirates" to finally "seagoing opportunists", petitioners have repeatedly attempted to portray the respondents as

parties who the courts should disdain. These "arguments" by counsel for the petitioners are nothing more than that- arguments!

At the trial of this matter, counsel for the petitioners made the same "arguments" but, as the district court found, offered "no proof of bad faith on the part of A.K. Steel or American Eagle...". (Pet. App. A-35). Moreover, the district court, after hearing petitioners' counsel's "arguments" and receiving the evidence, concluded that American Eagle and A.K. Steel had acted in "good faith". (Pet. App. A-15).

More importantly, petitioners did not raise the issue of the district court's factual finding of the respondents' "good faith" or the alleged "bad faith"on appeal to this Court. The reason for this election is relatively simple- petitioners cannot offer any "evidence" to overcome the district court's factual finding of "good faith" and the resulting "manifest error" standard of review. Accordingly, respondent A.K. Steel respectfully requests this Court to dismiss petitioners' "arguments" concerning the alleged "bad faith" of respondents without consideration.

Beyond the "smoke" of petitioners' allegations of bad faith lies the "mirror" of petitioners' misdirected arguments. Rather than answering the question concerning the perceived error of the lower courts in allowing the recoupment of a salvage lien or even answering its own issue concerning the alleged "exclusive" ways to preserve the salvage lien, petitioners' conclusion provides a rambling insight into the lack of cohesive legal argument to support their writ application. For example, petitioners argue the Court should review "the breakdown of the numbers" to show that they were inequitably treated by the lower courts. Petitioners argue

that, after paying nearly a million dollars for the steel, they "received a mere $37,000." (Pet. Brief at pg. 28). The judgment by the district court, however, belies this argument. (Pet. App. A-40). Petitioners paid Duferco $986,352.41 to resolve the insurance dispute over the steel. The district court awarded petitioners total damages of $827,277.06 or 83.87% of their payment to Duferco against UMS, American Eagle and A.K. Steel. The remaining monies went to UMS as the coinsurers.

Another example of petitioners' misdirection is the "Nostradamus" - like foreshadowing of doom to the concept of uniformity in admiralty law. Putting aside petitioners' clairvoyance, their writ does not provide any legal authority to support their argument that a salvage lien must be "exclusively" preserved in the two manners argued. The decision of Falgout Bros. v. The S/V Pangaea, 966 F. Supp. 1143 (S.D. Al. 1997) does not provide any guidance for the issue on appeal because it addresses the affirmative prosecution of a salvage lien as a separate action. Falgout Bros. does not address the defensive use of a salvage lien as a recoupment against damages in a lawsuit over ownership of salved goods.

Rather than the complicated scenario portrayed by the petitioners, the issue before this Court is relatively simple- did the lower courts commit reversible error by allowing the respondents to set off an award of damages to the petitioners by the recoupment of a good faith salvage lien?

Certainly, petitioners do not contest respondents' ability under the Federal Rules of Civil Procedure to raise recoupment as an affirmative defense under *Fed. R. Civ. P.*, Rule 8(c). Likewise, petitioners cannot contest that both

respondents properly raised the issue of the salvage lien and a request for set off as an affirmative defense. *Fed. R. Civ. P.*, Rule 8(c), Rule 15(c), (Res. App. C, D). Accordingly, the narrower issue for this Court to decide is whether salvage law allows a good faith salvor and purchaser to set off an award of damages by recoupment of the salvage lien? If the answer is yes, then the lower courts did not commit any reversible error.

While this Court has never specifically addressed the issue of recoupment of a salvage lien, the Court has acknowledged that the general principal of recoupment in applicable in a number of contexts. Reiter, supra; and U.S. v. Western Pacific R. Co., 352 U.S. 59,71,1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). Nor is the principal of recoupment foreign to cases in admiralty law. Distribution Services, supra and Basic Boats, supra. Moreover, the principal of recoupment is based in equity, which is the very bedrock of admiralty law.

Petitioners, on the other hand, would have this Court fashion a rule that would deprive a good faith salvor and purchaser of the benefits of their efforts because they asserted their salvage lien via an affirmative defense instead of a separate cause of action. Not only would such a holding run counter to the primary purpose of the merger of the Admiralty Rules with the Federal Rules of Civil Procedure but it would also encourage a race to the courthouse. Under petitioners' rule, an owner could file a claim first and defeat a salvor's claim or defense. Even more ominous, an owner could wait until the expiration of the salvage statute of limitations or, as in this case, until the salved goods were sold and consumed to file a suit for damages and bar the defense of recoupment of the salvage lien. Neither scenario comports with the equitable principles which guide this Court, sitting in

admiralty. Nor does petitioners' proposed rule overcome the principle of unjust enrichment of petitioner to the detriment of the good faith salvor and purchaser.

Rather than creating a contradiction, as argued by petitioners, the lower courts' decisions simply reaffirms this Court's long standing precedent- a salvor has a duty to preserve the salvaged goods for the benefit of the owner and not to sell those goods, even if they are believed to be abandoned, until the adjudication of title in a court of competent jurisdiction. Failure to do so will result in an award of damages in a conversions suit. In the case at bar, those damages were an additional $190,975.68, plus costs and interest, above the salvage lien. Such damages coupled with the specter of attorney's fees provide a substantial deterrent to the wayward salvor portrayed by the petitioners.

Once the Court disregards the disparaging arguments regarding alleged bad faith and the predictions of doom, the remainder of petitioners' writ provides only a scintilla of substantive argument and even less case support. Petitioners' writ does not cite a single case that a salvage lien must be preserved "exclusively" in the manners argued. Equally as important, petitioners' writ refuses to even address the real perceived error of the lower courts- the use of recoupment in a salvage case.

Respondent A.K. Steel respectfully submits that the lower courts did not commit reversible error by allowing respondents to set off the award of damages to petitioner through the recoupment of their good faith salvage lien. Accordingly, respondent A.K. Steel respectfully requests this Court deny the relief requested by petitioners.

Supreme Court, U.S.
JAN 26 2001
OFFICE OF THE CLERK

(4)

No. 00-1046

In the Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; NORTHERN ASSURANCE CO., LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and A.K. STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

PAUL C. MINICLIER
LAW OFFICE OF PAUL C. MINICLIER
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New Orleans, Louisiana 70130
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Attorneys for Respondent,
A.K. Steel Corporation

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CHANGE

DATE 03/08/95

CHANGE NOTICE 28106501326

Reference the above Number on all Documents and Correspondence

AK Steel

FED. I.D. NO. 31-1267629

0661

AK Steel Corpo

AE,77

EXHIBIT NO. 12

D. CURE CSR

AMERICAN EAGLE
2025 DESTREHAM AVENUE
HARVEY LA 70058

39281

SHIP TO:

AK Steel Corporation

INVOICE TO:

PH:800-324-3538
FX:504-340-9629

PROMISED: → 01/12/95

ROUTING

FOB ORIGIN POINT FREIGHT EQUALIZATION POINT RATE UNIT

TERMS FINAL CHARGE CONFIRM DATE QUOTE NO. QUOTE DATE FIRM DATE

287-2971-6893-0000

ITEM QTY. UM DESCRIPTION PRICE

ADJUST THE ORIGINAL PURCHASE ORDER AND ALL PREVIOUS CHANGE NOTICES WITH THE FOLLOWING CHANGES, DATA NOT ALTERED OR SPECIFICALLY MENTIONED REMAINS UNCHANGED.

TYPE OF CHANGE: DESC

1 3750 NTN ILVA SUNKEN SLABS ABANDONED AT CAIRO MI 176.0000
PRICING INCLUDES FREIGHT AND BARGE RENTAL, RIGHTS
AND POSESSION IN SALVAAGE AND TITLE RIGHTS, IF
ANY AMERICAN EAGLE MAY HAVE CHANGES MID STREAM
AT PORT OF VICKSBURG, MI
ESTIMATED QUANTITY IS 3750 NET TONS
AK STEEL WILL INSPECT AND APPROVE THE SLABS
FOLLOWING SLAVAGE AND PRIOR TO SHIPMENT
AMERICAN EAGLE WILL WARRANT AND
DOCUMENT THAT THE SLABS HAVE BEEN ABANDONED FOR
SALVAGE BY THE OWNERS/UNDERWRITERS
PAYMENT FOR THE SLABS WILL BE WIRE TRANSFERRED TO
AMERICAN EAGLE UPON AK STEEL'S APPROVAL OF THE
SLABS AND PRIOR TO SHIPMENT OF SLABS FROM PORT OF
VICKSBURG, MI AND UPON PRESENTATION OF AN ON
BOARD ORIGINAL BILL OF LADING TO BUYER
TONNAGE IS DETERMINED BY MEASUREMENT AND
CALCULATION OF WEIGHT, SUBJECT TO VERIFICATION OF
ACTUAL WEIGHT AT AK STEEL'S MILL
AMERICAN EAGLE AGREES TO SELL AK STEEL ALL
SALVAGABLE SLABS AND WILL ENDEAVOR TO RAISE ALL
SLABS POSSIBLE FOR SALE
EXCLUSIVELY TO AK STEEL. SLABS WILL BE WHOLE AND

Mail Shipping Documents and Invoices in Duplicate to the Invoice Address Above.
INVOICES NOT SHOWING PURCHASE ORDER NUMBER WILL BE RETURNED.
TERMS/CONDITIONS: Subject to and Valid Only With the Inclusion of All Terms and Conditions on Reverse. No Terms and Conditions of Seller Will Bind Buyer Without Buyer's Written Consent.

AK Steel Corporation
Purchasing & Transportation Department
V. L. RILEY
VLRiley
PH:513-425-2945 FX:513-425-5434

CAROL SUHICH S1630

28106501326

MAR 08 '95 02:00PM AK STEEL CORPORATION P.2

A-1

BEST AVAILABLE COPY

DISCRETION.
BUYER SHALL UPON ACCEPTANCE OF THIS PURCHASE ORDER BY SELLER, REMIT TO SELLER NIA WIRE TRANSFER THE SUM OF $25,000. iT IS UNDERSTOOD BY THE PARTIES THAT THIS SUM REPRESENTS A DOWNPAYMENT, AND BUYER BUYER'S RIGHT TO RECEIVE EXCLUSIVELY ALL SLABS SALVAGED BY SELLER.
IT IS FUTHER AGREED THAT SHOULD SELLER FAIL TO SALVAGE AT LEAST SEVEN SLABS OR SHOULD THE SLABS SALVAGED BY SELLER BE UNACCEPTABLE TO BUYER. THEN SELLER SHALL RETURN THE DOWN-PAYMENT IN FULL TO BUYER. SHOULD BUYER REJECT THE SLABS SALVAGED BY SELLER, SELLER MAY FOLLOWING RETURN OF DOWN-PAYMENT TO BUYER, DISPOSE OF ALL REMAINING SLABS AT HIS DISCRETION.
PAYMENTS WILL BE IN THE FORM OF A WIRE TRANSFER AND BASED UPON THE MUTUAL AGREEMENT OF THE SELLER AND BUYER AND BUYERS ACCEPTANCE OF SALVAGED SLABS.
UPON MUTUAL AGREEMENT OF SLAB QUALTIY AND SALVAGE WILL PROCEED WIHTOUT FURTHER DELAY.
PRICING INCLUDES BARGE RENTAL AND FREIGHT TO CINCINNATI OHIO. BUYER HAS THREE LAY DAYS IN CINCINNATI TO OFFLOAD SLABS EXCLUDING HOLIDAYS AND WEEKENDS, IF BUYER FAILS TO OFFLOAD SLABS WITHIN THREE WORKING DAYS, THEN BUYER WILL PAY BARGE DEMURRAGE OF $150/DAY.
NOUN QUALIFIER: SLAB,STEEL
Req. by: 02/01/95 At DOOR#: 021

COMMENTS:

1. American Eagle Marine shall supply the attached documents on ownership and abandonment of the slabs. American Eagle sells all its rights, interest, and possession of such slabs retrieved to AK Steel for the above captioned price.

2. Payment weight shall be calculated by physical measurement of each slab and multiplying if by a weight factor of .283 lbs per cubic inch. Steel shall be paid for by the short ton of 2,000 lbs.

3. American Eagle shall supply the necessary barges to offload slabs from wreck. Barges shall be paid for by American Eagle until such time as they leave the wreck sight. At that time AK Steel shall reimburse American Eagle for barge rental until the barge is returned to its destination. American Eagle shall not mark up barge rental. AK Steel is responsible for all towing and transportation cost for the retrieved slabs.

Omitted per negotiations DSL

ACCEPTED March 8, 1995
Doug Williams - President

MAR 03 '95 02:01PM AK STEEL CORPORATION

A-2

AK Steel Corporation
TERMS AND CONDITIONS

1. **DEFINITIONS:** The term "Purchaser" as hereinafter used means AK Steel Corporation and the term "Seller" means the person, firm or corporation from whom the merchandise described on the reverse side hereof has been ordered.

2. **QUANTITIES:** The quantity of merchandise delivered by Seller to Purchaser shall not be greater than the amount specified on the reverse side hereof unless an additional amount is first ordered by Purchaser in writing on its "Change Order Form."

3. **PACKAGING:** Seller shall properly package all merchandise for safe shipment to the Purchaser and a notice of shipment shall be sent by Seller to Purchaser at the time the merchandise described on the reverse side hereof is shipped which shall state the number of the order, the kind of merchandise, the Seller's name and the route by which the shipment is being made.

4. **TRANSPORTATION COSTS:** Seller warrants that any transportation costs included in the price will not exceed actual transportation costs paid by Seller. If this order calls for payment of any transportation costs by Purchaser, Purchaser shall in no event be liable or accountable for any amount in excess of the actual costs of transportation. Seller shall be accountable for any excess transportation costs arising from Seller's failure to make delivery to the f.o.b. point or to follow shipping instructions specified on the face of this order.

5. **CANCELLATION:** If the merchandise covered by this order is standard stock merchandise, Purchaser, at its option, may cancel at any time any unshipped portion of this order without further obligation hereunder, except to make payment, subject to other applicable terms hereof for the merchandise actually shipped prior to such cancellation. If this order covers merchandise manufactured or fabricated to Purchaser's specifications or specifications especially prepared by Seller for Purchaser, then at any time prior to delivery of all merchandise covered hereby, Purchaser, at its option, may cancel this order, in whole or in part, by written or telegraphic notice to Seller, and in such event the following provisions shall govern and control:

(a) Upon effective date of such cancellation, Seller shall stop all work in connection with this order, except as otherwise directed by Purchaser.

(b) Purchaser shall pay Seller's actual and direct out-of-pocket costs to the date of such cancellation, including Seller's expense in connection with cancellation of any subcontracts, all as approved by Purchaser, plus 6% of such costs, provided, however, that in no event shall the total amount to be paid upon such cancellation, plus payments previously made, exceed the lesser of (i) the total aggregate purchase price equivalent to the percentage of the work performed up to cancellation; or (ii) that proportion of the aggregate total purchase price equivalent to the percentage of the work performed up to cancellation.

(c) On such payment the materials or uncompleted portions of the work shall be the property of Purchaser and shall be subject to its disposition. The remedies provided herein are seller's exclusive remedies should this contract be cancelled.

None of the above provisions of this Article 5 relating to payment upon cancellation shall apply in the event that at the time notice of cancellation is given, Seller is in default in delivery or otherwise or has breached any terms or conditions of this order. In the event of any such default or breach, Purchaser shall have the right to terminate this order in whole or in part, and Purchaser may procure elsewhere merchandise similar to the merchandise as to which the order is so terminated, and Seller shall be liable for any costs for such similar merchandise in excess of the price or prices specified herein, provided, however, that Seller shall continue the performance of this order to the extent not terminated by Purchaser. In addition to the rights provided above, Purchaser may exercise any other rights or remedies provided by law or under this order for any such default or breach by Seller.

6. **INSPECTION:** At any time during the performance of this contract Purchaser shall have the absolute right to inspect the equipment wheresoever located. If upon inspection or testing such merchandise is found to be unsatisfactory, defective, of inferior quality or workmanship or fails to meet any guarantees or operating or other specifications contained herein or any other requirements of this Purchase Order, then without prejudice to any other rights or remedies, Purchaser may return the merchandise or any part thereof to Seller, and all amounts therefore paid by Purchaser to Seller on account of the purchase price of such returned merchandise, together with any costs incurred by Purchaser in connection with the original delivery or return of such merchandise, shall be repaid to Purchaser by Seller. Neither the inspection nor acceptance of merchandise shall release the Seller from any of the warranties or other provisions of this Order. Purchaser reserves the right, even after it has paid for and accepted said merchandise, to make a claim against Seller on account of any merchandise hereby ordered which does not prove to be satisfactory or is defective.

7. **WARRANTY:** The Seller warrants all equipment, materials and supplies (hereinafter call "equipment") furnished under this Purchase Order against defects in material and workmanship; and, where design is the responsibility of the Seller, against failures to perform in accordance with the requirements of this Purchase Order and applicable specifications. The warranty period shall apply, at least, throughout the first twelve months of operation of said equipment by Purchaser provided, however, that should Seller perform warranty re-work on the equipment or any part thereof the warranty period shall be extended for an additional twelve month period.

Should any part of said equipment fail to function or meet the required performance as specified above, or should defects in material or workmanship appear within the period specified above, Seller shall immediately upon receipt of notification from Purchaser, make changes, corrections and/or additions - or authorize Purchaser to make such changes, corrections or additions as Purchaser deems necessary to fulfill the performance requirements of the specifications and/or correct all such defects. These changes/additions, including the removing and replacing of all parts required for the correction, shall be made at Seller's sole expense and without charge to Purchaser.

8. **PATENT INFRINGEMENT:** The Seller will protect, defend and indemnify Purchaser for all costs, expenses or damages arising from the infringement or alleged infringement of letters patent by the material or by equipment furnished pursuant to this order, or by the necessary or contemplated use of the material or operation of the equipment so furnished.

9. **LOSS DAMAGE:** Seller shall assume and pay any and all loss or damage to said merchandise from any cause whatsoever until delivered to Purchaser at the f.o.b. point specified on the reverse side hereof. Upon delivery of such merchandise to a common carrier at such f.o.b. point properly consigned to Purchaser, any loss or damage to such merchandise thereafter occurring shall be borne by Purchaser.

10. **LAWS AND REGULATIONS:** Seller warrants that all merchandise delivered pursuant to this order shall have produced, sold and delivered to Purchaser in compliance with all applicable laws and regulations and that the prices therefor are not in excess of any applicable prices established by law or governmental regulation. Seller promises to give a written, signed certification in the following words, or words substantially equivalent thereto, which will appear on the invoice or some other document arriving with the merchandise:

> "We hereby certify that the goods covered by this invoice were produced in compliance with all applicable requirements of the Fair Labor Standards Act, as amended, including Sections 6, 7 and 12 thereof, and of the regulations and orders of the United States Department of Labor issued under Section 14 thereof."

11. **MISCELLANEOUS:** Time is of the essence hereof. In accepting this order or making any deliveries hereunder, Seller agrees to all of the terms and conditions stated on this Purchase Order form and agrees to perform this order and make deliveries hereunder as required hereby. This Purchase Order, together with any written documents which may be attached hereto and/or incorporated by specific reference, constitutes the entire agreement between the parties and supersedes all previous communications between them, either oral or written. All such previous communications are hereby abrogated and withdrawn, and no stipulations, representations or agreements by Purchaser or any of its officers, agents or employees shall be binding on the Purchaser unless reduced to writing and attached to or incorporated in this Purchase Order by reference as above provided and no local, general or trade custom shall alter or vary the terms hereof.

12. **GOVERNING LAW:** This Purchase Order is to be construed and determined in accordance with the laws of the State of Ohio.

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MAR 01 '95 02:32PM AK STEEL CORPORATION

SALVAGE CONTRACT

This agreement is entered into on this 24 day of January, 1994, between Italian Claims Agency, Inc., Agent for Duferco S.A. of Lugano, Switzerland, located at 530 Burnside Avenue, Inwood, New York 11696, hereinafter referred to as "OWNER"/Agent and American Eagle Marine, Inc., located at 2025 Destrehan Avenue, Harvey, LA 70058, hereinafter referred to as "SALVOR."

WITNESSETH

For and in consideration of the sums identified below and the mutual covenants and agreements herein contained, the parties hereto agree and undertake as follows:

1. OWNER warrants that it is the OWNER or the Agent of OWNER with full authority to act on behalf of OWNER, of the contents of two presently submerged barges located near the bridge crossing the Mississippi River at Vicksburg, MS. The contents of the two barges, hereinafter referred to as "CARGO" collectively consist of 158 steel slabs ranging in size 25'-33.66' in length x 49.6"-55.51" in width x 9.57" thick, and each weighing approximately 23 tons.

2. Within forty-eight (48) hours from the date this contract is executed by all parties and delivered to SALVOR, SALVOR shall commence salvage operations, weather permitting, and use its best efforts to remove the subject CARGO from the barges in question. Weather permitting for this purpose means the river stage is 20' or below on the Vicksburg gauge (maintaining). Salvage operations will continue once started on a daily basis with the only reason for work stoppage being weather or river conditions. The steel slabs in question are to be loaded and stowed by the SALVOR into barges to be provided at the salvage site by the OWNER.

3. SALVOR'S only obligation under this contract shall be to use its best efforts to remove said CARGO from said location and to deliver the same duly stowed on the hopper barges which shall be provided by the OWNER. SALVOR shall conduct all salvage operations in a workmanlike fashion with due care and skill.

4. SALVOR shall at all times be an independent contractor with full operational control of the salvage; OWNER is interested only in the successful removal of the CARGO. SALVOR shall furnish all necessary supervision, labor, vessels, equipment, machinery, tools, materials, service and supplies as deemed necessary for the performance of the cargo removal in a diligent and workmanlike manner, SALVOR may subcontract the performance of all or a portion of the said services to such contractors, suppliers and material men (including affiliated,

* NOTE * PARAGRAPH 1 WARRANTY OF OWNERSHIP

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subsidiary and related companies of SALVOR) as SALVOR shall deem necessary and/or appropriate to accomplish such service, provided that the entering into of any subcontract shall in no way diminish SALVOR'S obligations hereunder. SALVOR further covenants, warrants and represents the work performed hereunder by it and/or its subcontractor shall be performed by SALVOR and any subcontractor in a workmanlike manner with due regard to generally acceptable standards in the marine salvage industry.

5. This contract is a "Salvage Removal" contract for cargo retrieval. SALVOR shall not be liable for any damage caused to said CARGO and shall be free to perform the salvage and delivery thereof in any manner that it deems most expeditious, subject to principles of good salvage operations. In this instance, good salvage operations shall not include drilling, cutting, or torching being done to the CARGO in question without the express written permission from the OWNER in advance of any of these actions. SALVOR will use due care in raising the CARGO.

At his option, SALVOR will not release the salvaged CARGO to OWNER until full payment is received for all services rendered.

6. OWNER specifically reserves the right to cancel this salvage contract with the SALVOR any time by providing the SALVOR with written notice.

7. Prior to the commencement of salvage operations, SALVOR will provide insurance coverage for contractor's liability in the amount of one million dollars ($1,000,00.00) on which it will name OWNER as an additional insured.

8. It is understood and agreed that the CARGO will be at the risk of her OWNER throughout the course of the salvage and recovery operation and delivery, and that SALVOR shall not be liable for any loss or damage to the CARGO or the submerged barge.

9. OWNER agrees to pay SALVOR for his time and materials used during the CARGO recovery operation. SALVOR'S materials shall consist of the D/B Gregory L (100SWL), or its equivalent, tug, slings, shackles, 5 divers, diving pipe, decompression chamber, labor, supervisions, fuel, subsistence, and consumables necessary to recover the CARGO. Not included in this rate are the two hopper barges required to receive the salvaged CARGO, and charges (if any) for their dockage while the CARGO recovery is ongoing. Also not included is any provision for propulsion of the hopper barges during the recovery operations or subsequent relocation.

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10. The above identified equipment and labor will be based on a 12-hour day rate cost of $11,500.00 per working day. If, in the sole opinion of SALVOR, an election is made not to work because of his concern for his equipment or the well being of his crew due to weather/river conditions, a standby rate of $5,000.00 per day shall be incurred by the OWNER.

Once the above-mentioned equipment has reached the jobsite, a lump sum mobilization/demobilization rate of $30,000.00 shall be due and payable within five working days of OWNER'S receipt of SALVOR'S bill for same. SALVOR agrees that the OWNER retains the sole authority without limit during the course of salvage operations to require demobilization and/or remobilization of SALVOR'S equipment.

12. Once on the jobsite, SALVOR shall bill owner for each 14-day period of work/standby completed. OWNER shall respond with payment within 5 working days, thereafter.

13. In the event that SALVOR completes the successful recovery of all 158 pieces of steel slab within 25 days or less from the date of startup once on the jobsite, a lump sum $350,000.00 will be payable, less all previous payments made by OWNER during the 25-day period.

14. OWNER agrees that nothing set out in the contract is intended to or shall deprive SALVOR of its SALVOR'S lien or any other lien provided by the laws of the state of Louisiana or any other state, or of the United States, but that it is the intent of this contract to preserve all such liens to SALVOR.

15. SALVOR shall be solely responsible for payment to any and all persons employed by them in connection with the salvage of the CARGO in question and shall indemnify and hold harmless the OWNER harmless from and against any claims, actions, and/or liens which may be asserted against the CARGO in question for labor and/or materials furnished to or for the benefit of CARGO interests by any person employed by, or acting on behalf of, the SALVOR in connection with this salvage operation. Furthermore, SALVOR shall be solely responsible for the safety of the salvage operations and thus remains the sole party responsible for any personal injuries sustained by its employees and/or those sustained by any of its subcontractors or any other third parties during the course of this contract.

SALVOR undertakes and agrees to indemnify and hold OWNER harmless from any loss, damages, claims, suits, fines, and penalties which may be suffered by OWNER and/or any of its property brought by any entity, public or private, claiming pollution, leakage, discharge or spillage of any oil, grease, chemical or any substance whatsoever from the SALVOR'S or its subcontractor's vessels and equipment.

SALVOR further agrees to indemnify and hold OWNER harmless from any loss, damages, claims, and/or suits brought by any entity relating to damages claimed to other vessels, structures, or other equipment or properties arising from the salvage operations in question.

17. This agreement shall be governed by and construed in accordance with the general maritime law of the United States of America, unless inapplicable, and then by the laws of the state of Louisiana, but not including any conflicts of law rule thereof which would direct or refer to the laws of another jurisdiction.

18. If, for any reason OWNER fails to pay any or all sums due SALVOR for services/material provided and owing to SALVOR pursuant to the provisions of this contract, then the OWNER is obligated to pay, in addition to the principal amount, all attorneys' fees and costs incurred by SALVOR in collection of the principal amount pursuant to this contract.

19. All notices required by this Agreement to be given by any party shall be deemed to be properly given if made in writing (i.e. telexed, telecopied and/or hand delivered) to the parties addressed as follows:

SALVOR
AMERICAN EAGLE MARINE, INC.
2025 Destrehan Avenue
Harvey, Louisiana 70058
FAX # (504) 340-9629
ATTN: Mr. Doug Adams

OWNER/AGENT OF OWNER
ITALIAN CLAIMS AGENCY, INC.
As Agent For
Duferco S.A. of Lugano, Switzerland
530 Burnside Avenue
Inwood, New York 11696

THUS DONE in triplicate original on the day and date cited above, in the presence of the undersigned competent witnesses and me, Notary, after reading of the whole.

WITNESSES:

Dana H. DeJean

Ernest L. Schick

Sworn to and subscribed before me
this 20th day of January, 1994

T. Justin Simpson

T. JUSTIN SIMPSON, Notary Public
Parish of Jefferson, State of Louisiana
My Commission is for Life.

SALVOR, AMERICAN EAGLE MARINE, INC.:

Doug Adams

ICA ITALIAN CLAIMS AGENCY, INC.

Your ref.: SALVAGE CONTRACT
DD. JANUARY 31, 1994
Our ref.: 604/93

Mr. Thomas C. Jahncke
AMERICAN EAGLE MARINE, INC.
2025 Destrehan Avenue
Harvey, LA 70059

New York 6 July, 1994

Dear Mr. Jahncke:

With reference to the aforementioned salvage contract and in conformity to Paragraph 6, we are instructed by Dufurco, S.A., to cancel said contract of salvage as cargo has been abandoned.

Very truly yours,

Victor Bruzzone

VB/rd

cc: Hill Rivkins Loesberg O'Brien Mulroy
& Hayden - Mr. Steven Vangel

* NOTE* LETTER OF ABANDONMENT

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To VAM DOUG ADAMS	From VICTOR BRUZZONE
Co. AMERICAN EAGLE	Co. ICA
Dept. PER OUR CONVERSATION	Phone # 516-239-7120
Fax # (504) 340-9629	Fax # 516-239-7720

530 Burnside Ave. Inwood, N. Y. 11696
Phone: 1. (516) 371-6006 - Fax: 1. (516) 371-6012

NOTARY PUBLIC:

_____

WITNESSES:

_____

_____

NOTARY PUBLIC:

_____

Sworn to and subscribed before me
this 31 day of JANUARY, 1994

_____

VICTOR J. BRUZZONE
Notary Public, State of New York
No. 4923720
Qualified in Westchester County
Certificate Filed in Westchester County
Commission Expires 3-14-94

OWNER, AS AGENT OF DUFERCO S.A.
ITALIAN CLAIMS AGENCY, INC.

Robin DeCuca

_____

A-9

LAW OFFICES
COURTENAY, FORSTALL, GUILBAULT, HUNTER & FONTANA, L.L.P.
(A LIMITED LIABILITY PARTNERSHIP)
730 CAMP STREET
NEW ORLEANS, LOUISIANA 70130-3702

FRANCIS A. COURTENAY, JR. *
TERRENCE C. FORSTALL *
JOHN S. HUNTER *
WAYNE J. FONTANA *
JOHN M. DAVES
DONALD J. VOLPI, JR.
DARYL J. DARCEY ††
WILLIAM J. SOMMERS, JR. ††
ROBERT P. REID*
RICHARD L. SEELMAN †
PHILIP S. BROOKS, JR.
PAUL M. BRANNON

* A PROFESSIONAL LAW CORPORATION
† ALSO ADMITTED IN ALABAMA AND ILLINOIS
†† ALSO ADMITTED IN TEXAS

TELEPHONE (504) 566-1601
FACSIMILE (504) 568-9130
EMAIL: POCOURTS@AOL.COM

CHARLES V. GUILBAULT
(1923 - 1993)

April 27, 1995

B-1

URGENT

VIA FACSIMILE 011-44171-390-9301
Underwriters at Interest
c/o HGC Syndicate #65
Attn: Mr. Peter Patient

VIA FACSIMILE 011-44171-481-1038
Lloyd's Claims Office
Attn: Mr. David Stoyles

VIA FACSIMILE 011-44171-662-2578
Commercial Union Assurance Companies
Attn: Ms. Allison Banks

VIA FACSIMILE 455-3495
Global Special Risks, Inc.
Attn: Mr. Mike Garin
(Claim No. C50925-0C001-3)

RE: Canal Barge Company
Sinking of Barges CBX-207 and CBX-214
DOL: October 16, 1993
Loss of Steel Slabs-$926,368.19
Claim of Duferco Steel, Inc.
Our File: 93-6430-1

Lady and Gentlemen:

We have just learned that American Eagle Marine, Inc. has begun removing the steel slabs from the sunken Canal Barges. American Eagle has undertaken this task without anyone's authority. However, we are of the opinion that American Eagle's actions will be deemed "salvage" and not a "find" entitling them to assert a salvage lien for their services. A "find" in maritime law differs from salvage in that in the former instance the property found has never been owned by any person. It therefore belongs to the finder. In the case at bar, the cargo taken from the bottom of the river is property subject to a salvage award if the property is in peril and American Eagle's services end in success or has contributed to such success. Conversely, if American Eagle is not successful or if the property is not in peril then no salvage award is due.

Keep in mind that the title or right of property of the owner of distressed goods on navigable waters is not lost or divested because of the mishap, although the property may become the subject of salvage services. Accordingly, underwriters are still deemed the owners of the steel slabs because they paid for them. When articles are lost at sea, the title of the owner in them remains, even if they are found floating on the surface or after being cast upon the shore. Webber Marine, Inc. v. One Large Cast Steel Stockless Anchor, 478 F. Supp. 973, 1981 A.M.C. 434 (E.D.La. 1979). Moreover, should a vessel or cargo be abandoned without hope of recovery or return, the right of property still remains in her owner. When property has sunk the owner has not been divested of title by virtue of that fact, and neither does the salvor gain title by finding it. The salvor obtains a right of possession; he does not acquire ownership or title to the salved property. It is his obligation to bring the salved property before an admiralty court where the owner will be given an opportunity to come in and claim the property. The salvor by bringing his salvage complaint and by having the recovered property arrested by the marshall, is enabled to take the necessary steps for securing his reward.

In order for American Eagle to prevail on their salvage claim, three elements must be present:

1. There must be property in peril on navigable waters;
2. The services must be voluntary; and
3. There must be success in whole or in part.

We believe that American Eagle will satisfy the second and third requirement, but may have difficulty proving the first requirement, that the property is in peril. The courts have held that the peril necessary to constitute a salvage service need not be one of imminent or absolute danger. However, the property must be in danger, either presently or reasonably to be apprehended. Ft. Myers Shell & Dredging Co. v. Barge NBC-512, 404 F. 2d 137 (5th Cir. 1968). The degree of peril, whether slight or serious, can effect the amount of the award, but not the establishment of a salvage service. Whether or not the cargo is in a condition of peril, when the services were rendered for which a salvage reward is claimed, is a question of fact to be determined from the circumstances present in each case. Absence of peril means the lack of an essential element necessary to support a claim for a salvage award, i.e. no peril, no reward.

As far as apprehension of danger is concerned, it is not essential in order to constitute a salvage service that the danger be immediate or absolute. It is sufficient that at the time the assistance is rendered, the cargo has encountered any danger or misfortune which might expose her to destruction if the service was not rendered. We, obviously, should take the position that the cargo is not subject to destruction by it being on the bottom of the river, therefore not in peril.

If we can prove that American Eagle does not account for all of the property raised from the barges, then the courts will hold that they are not entitled to a salvage award. One who plunders, steels or destroys any goods in distress, in addition to losing its salvage lien can be fined not more than $5,000 or imprisoned for not more than ten years or both. 18 U.S.C. § 1658. We must, of course, concern ourselves with American Eagle lifting the slabs and hiding them or selling them without our authority.

American Eagle may take the position that we have abandoned the property at the bottom of the river. Abandoning maritime property within the meaning of the salvage law is

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the act of leaving or deserting such property by those who were in charge of it, without hope on their part of recovering it and without the intention of returning to it. Obviously, we have not abandoned the property even though it has been sunk for approximately two years. The courts have held that "a case of the total abandonment of a vessel upon the Mississippi River very rarely occurs, especially where ... she is stranded near the shore." Montgomery v. The T.P. Leathers, F. Cas. 9736 (D.La. 1852).

One who aids distressed property on navigable waters has the right of possession. No other person or persons, without his consent, can lawfully intrude upon that possession. As stated above, the salvor in possession has the right to bring the property within the jurisdiction of the admiralty court. He is under no obligation to accept just any sum which the vessel owner or his representative offers him. He must however, at all times, act in good faith and with complete honesty. Otherwise, he may waive his salvage lien. When the property has been brought to the surface, the salvor is not bound to surrender possession. He can retain possession of the property until payment of the salvage reward is made or security given to secure the release of the property; or the property can be retained, should payment not be made or bond given, until it is taken into custody by the admiralty court.

The successful salvor possessing as he does, a maritime lien for the salvage services rendered to the imperiled property, can enforce the lien by proceeding against the salved property by a salvage suit *in rem*. If the matter of the award has not been settled amicably, either after negotiation between the parties or by resort to arbitration, the salvor can then take such steps as will ensure that the proceeds from the sale of the property saved will provide the compensation for his services. Therefore, after American Eagle raises the steel slabs they do not have to surrender them to us until we either pay them for their services or we post security. They must first, however, convince the court that the slabs were in peril.

In summary, it can be stated that one who voluntarily and successfully saves imperiled property on navigable waters, be it damaged, derelict or wrecked, does not become the title holder of the property, but saves the property for the benefit of the owner with the expectation of receiving an appropriate salvage award.

Accordingly, in our opinion, the actions of American Eagle, while not authorized, will give rise to a claim for a salvage award. The only option for us to take, is to convince the court that the cargo was not in peril. If the court disagrees with us, than we will obviously attempt to keep the salvage award as low as possible. Keep in mind that we would have had to raise the steel slabs anyway at a significant cost to underwriters. We will need to retain other salvors in this area to bolster our contention that the salvage award that American Eagle claims (whatever that may be) is unreasonable and should not be accepted by the court.

Because the steel slabs are valued at more than what underwriters paid for them, we recommend that you authorize us to put American Eagle on notice of underwriters ownership and title to the steel slabs and that they must account to a court for whatever slabs they raise. We also recommend that you authorize us to hire a marine surveyor, one involved originally, to watch over American Eagle and keep them honest.

We need this authority very promptly because American Eagle is apparently on site at

present and has been for several days, how long we do not know yet.

With best regards, I remain

Very truly yours,

Francis A. Courtenay, Jr.

FAC/RPK/mrt

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN HENRY ARTHUR ADAMS, ET AL	*	**CIVIL ACTION**
	*	**NO. 94-1954**
VERSUS	*	
	*	**SECTION "N" (4)**
UNIONE MEDITERRANEA DI SICURTA, ET AL.	*	

ANSWER TO SUPPLEMENTAL AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND COMPLAINT

NOW INTO COURT, through undersigned counsel, comes American Eagle Marine, Inc. ("American Eagle"), defendant herein, and for answer to the Supplemental and Amended Complaint for Declaratory Judgment and Complaint of Steven Henry Arthur Adams, For Himself and as Representative of Certain Underwriters at Lloyd's and Certain British Insurance Companies, plaintiff herein, respectfully avers as follows:

FIRST DEFENSE

For answer to the separately numbered paragraphs of Plaintiffs' Supplemental and Amended Complaint for Declaratory Judgment and Complaint, American Eagle avers that:

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A.

The allegations contained in Articles I, II, III, IV, V, VI, VIII and XIV of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint do not pertain to American Eagle and therefore, require no answer, but to the extent that answer may be deemed to be required, such allegations are denied for lack of information sufficient to form a belief at to the truth thereof.

B.

The allegations of Article VII of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint are admitted.

C.

The allegations of Article IX and XII of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint are denied.

D.

The allegations of Article X and XIII of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint are denied for lack of information sufficient to form a belief as to the truth of the matters asserted therein.

E.

In response to the allegations of Article XI of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint, American Eagle admits that it received the correspondence attached as Exhibit "B" to the

Supplemental and Amended Complaint for Declaratory Judgment and Complaint, and American Eagle further avers that said correspondence is the best evidence of its own assertions. However, American Eagle has no knowledge as to the accuracy of the representations made therein and must therefore, deny the allegations of this Article for lack of information sufficient to form a belief as to the truth thereof.

F.

The allegations of Articles XV, XVI and XVII of the Supplemental and Amended Complaint for Declaratory Judgment and Complaint state conclusions of law which require no answer, but to the extent that these allegations are deemed to require answer, they are denied.

SECOND DEFENSE

American Eagle avers that it had no knowledge of any ownership interest in the steel slabs as alleged by plaintiffs and that, upon notice from Duferco, through the Italian Claims Agency, that the slabs had been abandoned, American Eagle undertook to save a portion of the cargo of steel slabs from their circumstances of peril. American Eagle was successful to some extent in raising a number of slabs but was unable to raise all slabs due to the adverse conditions presented by the Mississippi River. American Eagle therefore claimed its preferred maritime lien over the slabs recovered and assigned its rights and interests, as to those slabs, to AK Steel. AK Steel was then free to assert it acquired rights against the steel slabs, and American Eagle is not responsible for any actions undertaken by AK Steel.

WHEREFORE, American Eagle Marine, Inc. prays that this answer be deemed and sufficient and that, after due proceedings had, there be judgment herein dismissing the

original and all supplemental and amending Complaints for Declaratory Judgment and Complaints filed on behalf of plaintiffs, with all costs of these proceedings taxes to plaintiffs and for such other general and equitable relief as this Court may deem just in the premises and be competent to grant.

Respectfully submitted,

T. JUSTIN SIMPSON (#18437)
LARZELERE & PICOU, L.L.P.
Suite 1100 - Two Lakeway Center
3850 North Causeway Blvd.
Metairie, LA 70002
Attorneys for American Eagle
Marine, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 29th day of November, 1995, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN HENRY ARTHUR ADAMS, For Himself and as Representative of Certain Underwriters at Lloyds, Et Al	*	**CIVIL ACTION** **No. 94-1954** **Section "K", Mag. 4**
VERSUS	*	**Judge Stanwood R. Duval, Jr.**
UNIONE MEDITERRANEA DI SICURTA, ILVA S.P.A., DUFERCO S.A., ARMCO STEEL COMPANY, L.P., CANAL BARGE CO., LTD. and DUFERCO STEEL, INC.	*	

ANSWER AND DEFENSES, AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND AMENDED CROSS CLAIM

NOW INTO COURT, through undersigned counsel, comes defendant, A. K. Steel Corporation (f/k/a Armco Steel Company, L.P.) (hereinafter sometimes referred to as "A.K. Steel"), and files their Answer and Defenses to the Complaint of Plaintiffs for Declaratory Judgment as amended and A. K. Steel's Amended Complaint for Declaratory Judgment and Amended Cross Claim and allege and aver upon information and belief as follows:

ANSWER AND DEFENSES

AND NOW, A.K. Steel files its Answer and Defenses to the Complaint by plaintiffs as amended and allege and aver upon information and belief as follows:

FIRST DEFENSE

A.K. Steel readopts and re-avers each and every Answer and Defense set forth in their original Answer and Defenses, Complaint for Declaratory Judgment and Cross Claim previously filed in this matter as if copied herein.

SECOND DEFENSE

Plaintiffs waived any claim for ownership and/or title in the sunken steel slabs at issue when they rejected the abandonment of the steel by Duferco S.A. and initially declined to make payment on this claim.

THIRD DEFENSE

Following the abandonment of the steel slabs by all owners and the rejection by underwriters, American Eagle, through their salvage efforts, and, in turn, A.K. Steel obtained ownership and/or title of said steel slabs free and clear of any claims of ownership by plaintiffs or any other party.

FOURTH DEFENSE

Following the abandonment of the steel slabs by Duferco S.A. and the subsequent rejection by UMS and plaintiffs, the subrogation/settlement agreement between plaintiffs and Duferco S.A. did not confer any ownership interest or title in said steel slabs.

FIFTH DEFENSE

Plaintiffs failed to join a necessary or indispensable party.

SIXTH DEFENSE

In regards to plaintiffs' claim of ownership of said steel slabs, this Court lacks subject matter jurisdiction.

SEVENTH DEFENSE

Plaintiffs lack representative capacity to bring a claim of ownership of said steel slabs.

EIGHTH DEFENSE

A.K. Steel prays, in the alternative and in the alternative only, that should this Honorable Court deem that American Eagle and/or A.K. Steel did not obtain ownership and/or title interest in said steel slabs, free of plaintiffs' ownership claim, all of which is specifically denied, and that ownership and/or title interest remains with plaintiffs, then A.K. Steel specifically prays that American Eagle and, in turn, A.K. Steel are entitled to recover all salvage expenses and bonus mitigate and/or offset any award of damages against A.K. Steel with any and all cost and/or expense of salvage services, as well as a salvage bonus for the extensive efforts required to salvage the steel slabs.

NINTH DEFENSE

A.K. Steel specifically reserves the right to file Supplemental Defenses to plaintiffs' Complaint as amended upon completion of additional discovery.

ARTICLE ONE

Except as previously admitted in prior Answer and Defenses, A.K. Steel denies the truth of the allegations contained in Article 1 of plaintiffs' Second Supplemental and Amended Complaint.

ARTICLE TWO

The allegations contained in Article 2 of plaintiffs' Second Supplemental and Amended Complaint are admitted.

ARTICLE THREE

The allegations contained in Article 3 of plaintiffs' Second Supplemental and Amended Complaint are admitted.

ARTICLE FOUR

The allegations contained in Article Four of plaintiffs' Second Supplemental and Amended Complaint are admitted.

WHEREFORE, A. K. Steel Corporation (f/k/a Armco Steel Company, L.P.) prays that after due proceedings be had there be judgment herein in its favor and against plaintiffs and for further relief as prayed for or as equity and justice require.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT TO QUIET TITLE

AND NOW, assuming the position of plaintiffs in their action for declaratory judgment to quiet title, A.K. Steel (f/k/a Armco Steel Company, L.P.) (hereinafter sometimes referred to as "A.K. Steel") and allege and aver upon information and belief as follows:

ARTICLE ONE

This Complaint for Declaratory Judgment is an Admiralty and Maritime claim within the meaning of 28 U.S.C. §1333 and F.R.C.P. Rule 9(h).

ARTICLE TWO

A.K. Steel readopts and re-avers each and every allegation previously set forth in its Complaint for Declaratory Judgment for Quiet Title.

ARTICLE THREE

A.K. Steel wishes to add the following paragraphs to its original Complaint for Declaratory Judgment as follows:

VII(a)

Defendant, Britamco Underwriters, Inc. (hereinafter referred to as "Britamco"), was at all times materially hereto, a foreign corporation organizing under the laws other than the State of Louisiana with its principal place of business in Fort Lauderdale, Florida and the underwriters and/or insurers of American Eagle Marine, Inc. and are responsible and/or liable under the policy of insurance for any and all acts and/or omissions and/or negligence of American Eagle Marine, Inc.

XIX

A.K. Steel prays in the alternative and in the alternative only that should this Honorable Court deem that A.K. Steel does not possess title to said steel slabs, all of which is denied, then A.K. Steel is entitled to recover all salvage expenses and bonus mitigate and/or offset any award of damages against it with any and all salvage expenses

incurred by American Eagle and/or A.K. Steel for the salvage of the said steel slabs, as well as a salvage bonus.

WHEREFORE, A. K. Steel Corporation (f/k/a Armco Steel Company, L.P.) prays that, after due proceedings be had, there be declaratory judgment in its favor awarding title to salvage steel slabs and denying any claim for ownership or title by defendants and for further relief as prayed for or as equity and justice require.

AMENDED CROSS-CLAIM

AND NOW, assuming the position of plaintiffs in cross-claim comes defendant, A. K. Steel Corporation (f/k/a Armco Steel Company, L.P.) (hereinafter sometimes referred to as "A.K. Steel") and allege and aver upon information and belief as follows:

ARTICLE ONE

A.K. Steel readopts and re-avers each and every allegation set forth in its previous cross claim.

ARTICLE TWO

A.K. Steel wishes to add the following paragraph to its original Cross Claim as follows:

I(a).

Made defendant in cross claim is Britamco Underwriters, Inc. (hereinafter referred to as "Britamco") and who at all times materially hereto and upon information and belief, is a foreign corporation with its principal place of business in Fort Lauderdale, Florida and the underwriters and/or insurers of American Eagle Marine, Inc. And are

responsible and/or acts and/or liable under the policy of insurance for any and all omissions and/or negligence of American Eagle Marine, Inc.

X.

In the event that this Court finds A.K. Steel is liable to plaintiff in the main demand, all which is specifically denied, A.K. Steel is entitled to judgment over and against Britamco in indemnity or contribution all sums which A.K. Steel may be cast in judgment, including damages sustained, attorneys' fees and litigation costs.

XIX

A.K. Steel prays in the alternative and in the alternative only that should this Honorable Court deem that A.K. Steel does not possess title to said steel slabs, all of which is denied, then A.K. Steel is entitled to recover all salvage expenses and bonus mitigate and/or offset any award of damages against it with any and all salvage expenses incurred by American Eagle and/or A.K. Steel for the salvage of the said steel slabs, as well as a salvage bonus.

WHEREFORE, A. K. Steel Corporation (f/k/a Armco Steel Company, L.P.) respectfully pray for judgment as follows:

1. In the event that A.K. Steel is cast in judgment are found liable unto plaintiffs and that there be judgment herein and in favor of A.K. Steel and against American Eagle and Britamco for all such sums as A.K. Steel is cast in judgment and require to pay.

2. There be judgment herein and in favor of A.K. Steel and against American Eagle and/or Britamco for all

damages sustained and for attorneys' fees and costs incurred by A. K. Steel in defending against the demands of plaintiffs.

3. There be judgement herein and in favor of A.K. Steel as prayed for or as equity and justice requires.

Respectfully submitted,

Paul C. Miniclier, T.A. (#17062)
The Law Office of Paul C. Miniclier
330 Camp Street, 2nd Floor
New Orleans, Louisiana 70130
(504) 524-3223

Attorneys for defendant,
A.K. Steel Corporation
(f/k/a Armco Steel Company, L.P.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by placing same in the United States mail, properly addressed and postage prepaid.

New Orleans, Louisiana, this ____ day of _____, 1997.